UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD R. POST	)	CASE NO. 1:97 CV 1640
	)	
Petitioner	)	JUDGE LESLEY WELLS
	)	
-vs-	)	MEMORANDUM OF OPINION AND
	)	ORDER GRANTING IN PART AND
RALPH COYLE, Warden	)	DENYING IN PART MOTION TO EXPAND
	)	THE RECORD, DENYING MOTION FOR
Respondent	)	EVIDENTIARY HEARING, AND DENYING
	)	PETITION FOR WRIT OF HABEAS
	)	CORPUS

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Wells, J.:

On 30 November 1984, Petitioner Ronald R. Post pled no contest to two counts of aggravated murder with specifications and one count of aggravated robbery with specifications. In March 1985, he was sentenced to death for the aggravated murder of Helen Vantz and ten to twenty-five years imprisonment for the aggravated robbery with an additional three years imprisonment for the firearm specification. Mr. Post's direct appeals and petition for postconviction relief to the Ohio courts were unsuccessful.

On 20 November 1997, Mr. Post filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. (Docket # 16). On 21 January 1998, Respondent Ralph Coyle filed a return of writ. (Docket # 22). On 2 April 1998, this Court granted Mr. Post's motion for an order requiring the State to correct and expand the record, (Docket # 42), and the State filed supplemental exhibits on 1 June 1998. Mr. Post then filed his traverse. (Docket # 84).

Mr. Post's motions to further expand the record and for an evidentiary hearing also are pending. (Docket # 82, 83). Responses and a reply have been filed. (Docket # 85, 86, 89).

A federal court's review of a habeas corpus petition is very different from a state court's review on direct appeal. The Antiterrorism and Effective Death Penalty Act of 1996 limits a federal district court's ability to grant a writ of habeas corpus where a state court considered the federal claim on the merits. When a federal court examines a state court's legal decision, the question is not whether the state court's decision was incorrect, but whether the decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of

the United States. 28 U.S.C. § 2254(d). It is not enough that a federal court disagrees with a state court decision; to grant a petition for a writ of habeas corpus, the federal court must find that the state court's decision was objectively unreasonable. In order to assess the reasonableness of a state court decision, a federal district court must examine the entire state record for itself.

For the reasons discussed below, upon full review of the record, this Court will deny Mr. Post's petition for a writ of habeas corpus. His motion to expand the record will be granted in part and denied in part. His motion for an evidentiary hearing will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Murder and its Aftermath

Because Mr. Post pled no contest to the aggravated murder of Helen Vantz and to the aggravated robbery of the Slumber Inn, the evidence concerning his role in her death and any attempts he may have made to escape detection were never submitted to a jury. Instead, similar versions of the facts of this case have been presented at the change of plea hearing, in state court opinions, and in the pre-sentence investigation report.

1. The Prosecution's Statement

During Mr. Post's plea hearing, with the defendant and defense counsel present, the prosecution read into the record the following statement of the facts surrounding Mrs. Vantz's murder.

On December 14, 1983, at approximately 7:00 p.m., Defendant Ronald Post met with Jeff Hoffner at the Home of Stephanie Sears, 202-B Gateway Boulevard, Elyria, Ohio.

Post and Hoffner then proceeded to the residence of Ralph Hall, who was residing with his wife, Debra, at the Colonial Motel, 38784 Center Ridge Road, North Ridgeville, Ohio. They picked up Hall, who brought with him a .22 caliber, Model RG145, handgun, Serial Number Z073087.

These three individuals then proceeded in Post's vehicle through North Ridgeville. While en route, they discussed robbing several different establishments in the area.

Shortly thereafter, the three attempted to rob the manager of an IGA store in North Eaton, Ohio. This attempt being foiled, they drove back toward Elyria.

During the ride, they discussed robbing the Slumber Inn, 318 Griswold Road, Elyria, Ohio. They decided to go to the Slumber Inn to determine whether this could be accomplished.

Upon arrival, the Defendant parked his vehicle in a parking lot located adjacent to the Slumber Inn. While Hall and Hoffner waited in Post's vehicle, Post entered the Slumber Inn for the purpose of casing the area.

While at the Slumber Inn, the Defendant met Carol Bokar, the afternoon shift desk clerk. Post and Miss Bokar knew each other from years before.

Post informed Miss Bokar that he was there for the purpose of checking out room rates, as he might need a place to stay. Post remained inside for a considerable length of time.

Upon Post's returning to his vehicle, the three occupants decided that they would not complete the robbery.

The Defendant then drove back to the Colonial Motel, where he dropped off Hall. It was at this time that the Defendant took possession of the .22 caliber handgun previously mentioned.

Post and Hoffner proceeded back to Elyria, where Post dropped off Hoffner at 202-B Gateway Boulevard.

The Defendant, Ronald Post, without the knowledge of Hoffner or Hall, then drove back to the Slumber Inn. Post began another conversation with Carol Bokar.

At approximately 12:15 a.m. on December 15, 1983, Mrs. Helen Vantz arrived for her shift as midnight desk clerk. Post was introduced to Mrs. Vantz by Carol Bokar as someone she had known in the past.

While Mrs. Vantz was at the desk, Post accompanied Miss Bokar while she checked out one of the motel rooms for a possible problem. Post and Miss Bokar returned to the motel lobby, where Miss Bokar advised Mrs. Vantz of the day's activities.

Miss Bokar indicated at this time that she was meeting a friend, Sandy Collins, at the Jackson Hotel, Elyria, Ohio. Miss Bokar also indicated to Mrs. Vantz that the Defendant might return to the motel to obtain a room.

Post and Bokar met Sandy Collins at the Jackson Hotel, where they stayed until approximately 2:15 a.m.

By 3:00 a.m. on December 15, 1983, the Defendant had returned to the Slumber Inn, armed with the handgun previously mentioned. His plan was to kill Mrs. Vantz and remove what valuables he could find from the Inn.

The victim, Helen Vantz, having previously been advised that the Defendant might return for purposes of obtaining lodging, allowed him to enter the lobby area.

The Defendant remained there, engaging the victim in conversation past the hour of 4:00 a.m., when she made a wake-up call to the occupants in Room Number 30.

The next wake-up call scheduled to be made was 6:00 a.m. This call was never made.

Sometime between the hours of 4:00 a.m. and 6:00 a.m. on December 15, 1983, at the Slumber Inn, 318 Griswold Road, City of Elryia, County of Lorain, and State of Ohio, the Defendant, Ronald Post, carried out his plan to rob the Slumber Inn and murder Helen Vantz.

As Mrs. Vantz was sitting at her desk preparing her nightly accounts, Post stationed himself just behind her right shoulder. From a distance of within six feet, the Defendant murdered Mrs. Vantz by firing his handgun twice into her head. The Defendant fired twice to insure that the victim was dead.

One projectile entered the right occipital area, traversing the superior part of the cerebellum and lodging in the opposite lateral temporal parietal area.

> The other projectile entered the right fronto-parietal area, traversing downward through Mrs. Vantz's right cerebral hemisphere and lodging in the basilar part of her occipital bone.
>
> The victim died as a result of these wounds, either one of which would have been fatal.
>
> After killing Mrs. Vantz, the Defendant removed certain items of value from the premises, including a bank deposit bag containing approximately $100, property of the Slumber Inn, and a handbag containing various items belonging to the deceased.
>
> At approximately 7:00 a.m., Mrs. Vantz's body was discovered by an occupant of the motel who was in the process of checking out. The body was slumped in the desk chair, where she was working when she was killed, and her pencil was still clasped in her hand. The Elyria Police Department received notification at 7:17 a.m.
>
> Meanwhile, the Defendant began to execute his plan to cover up his crime. At approximately 5:00 a.m., he returned to North Ridgeville and advised Ralph and Debbie Hall of what he had done. Post asked Hall to dispose of the murder weapon.
>
> He then proceeded to the house of James Harsh, 225-A White Oak Drive, Elyria, Ohio, for the purpose of establishing an alibi. He obtained a commitment from Mr. Harsh to state that he arrived at the Harsh residence at approximately 2:30 a.m. and stayed there until 7:30 a.m., December 15, 1983.
>
> He later confessed to Mr. Harsh that he had killed Helen Vantz and robbed the Slumber Inn, thereby causing Mr. Harsh to recant his story as to the Defendant's whereabouts the morning of the crimes herein.
>
> The Defendant made several other incriminating statements outlining his sole involvement in these crimes to several individuals, including David Thacker, Richard Slusher, Jeff Hoffner, and John Thompson.
>
> The Defendant admitted to Detectives Medders and Jaykel of the Elyria Police Department on April 13, 1984, that he had previously told David Thacker that he was the perpetrator of these crimes.

(Docket # 23, Ex. 1 at 52-58).

This statement of facts was quoted verbatim by the Ohio Court of Appeals on direct appeal. (Docket # 24, Ex. F at A6-A9). The Supreme Court of Ohio began its

opinion on direct review with a statement of facts substantially identical to this one. (Docket # 25, Ex. R at 380-381).

2. The Pre-Sentence Investigation Report

The version of events set forth in the pre-sentence investigation report ("PSR") contains significantly more detail but parallels the essential elements of the prosecution's account. Most notably, the PSR reiterates that Mr. Post obtained access to the motel through Carol Bokar, that he asked his friend James Harsh to lie for him, and that he later admitted his involvement in the murder to Mr. Harsh, David Thacker, Sally Thacker, and John Thompson.[1] (Docket # 24, Ex. I at A84-A90). The PSR states that Mr. Post confessed to the murder on three separate occasions to David Thacker, who had been "wired for sound" by the police. (Docket # 24, Ex. I at A88-A90). The PSR also states that Ralph Hall turned over to the police a .22 caliber revolver, which contained two spent rounds and which testing revealed was the weapon used to shoot Helen Vantz. (Docket # 24, Ex. I at A89). Mr. Hall also told police that Mr. Post burned Ms. Vantz's handbag in a 50-gallon drum. (Docket # 24, Ex. I at A89). The police located the drum, which contained remnants of a handbag and a nail polish bottle of the type used by Mrs. Vantz. (Docket # 24, Ex. I at A89).

B. Pre-Plea Events

[1] The PSR indicates that Mr. Thompson overheard discussions between Mr. Post and Mr. Thacker regarding Mr. Post's involvement in the murder.

On 17 April 1984, Mr. Post was indicted for the 15 December 1983 murder and robbery of Helen Vantz. Count 1 alleged Mr. Post committed aggravated robbery in violation of O.R.C. § 2911.01. Count 2 alleged Mr. Post "did, purposely and with prior calculation and design, cause the death of Helen G. Vantz" in violation of O.R.C. § 2903.01(A). Count 3 alleged he "purposely cause[d] the death of Helen G. Vantz while committing or attempting to commit aggravated Robbery." All three charges contained firearm specifications, and Counts 2 and 3 added the death penalty specification that the murder took place during the commission of an aggravated robbery and that Mr. Post was the principal offender. (Docket # 49, Ex. 9). The case was assigned to Judge Adrian Betleski of the Lorain County Court of Common Pleas. (Docket # 49, Ex. 23).

Mr. Post was arraigned on 24 April 1984 and pled not guilty to all charges. (Docket # 47, Ex. 248). The same day, Judge Joseph Cirigliano appointed Ernest Hume and Michael Duff to defend Mr. Post. (Docket # 49, Ex. 23). On 24 September 1984, Judge Betleski permitted Mr. Hume to withdraw as defense counsel on ethical grounds and appointed Lynett McGough as Mr. Duff's co-counsel. (Docket # 49, Ex. 84).

Prior to Mr. Hume's departure, he and Mr. Duff had retained two experts, Robert Holmok and Lewis Szanyi. (Docket # 84 at 1). Mr. Holmok, a polygraph examiner, was the owner of Seaway Polygraph Service and a detective for the Lakewood, Ohio police department. (Docket # 78 at 8). In mid-May of 1984, Mr. Hume contacted Mr. Holmok, and asked him to give Mr. Post a polygraph test. (Docket # 78 at 9-10). Mr. Holmok agreed and interviewed Mr. Post at the jail on 21 May 1984 in order to assist the defense in the preparation of its case. (Docket # 78 at 10-11, 33). No one

else was in the room at the time. (Docket # 78 at 11). Initially, Mr. Holmok collected some "necessary background information" and then conducted a "pre-test interview" without using the polygraph instrument. (Docket # 78 at 40). According to Mr. Holmok, during the pre-test interview, he obtained a confession from Mr. Post. (Docket # 78 at 40). Mr. Holmok wrote out the following statement, which Mr. Post signed:

> The following statement is only to be given to my attorney, Ernie Hume, and is not to be admitted in court against me.
>
> I did the robbery of the Slumber Inn & shot the clerk, Helen.
>
> /s/ Ronald Post

(Docket # 78 at 41; Docket # 24, Ex. D at App. B).

On 1 August 1984, the prosecution filed subpoenas duces tecum, ordering Mr. Holmok and Mr. Szanyi to appear before the Lorain County Grand Jury regarding Mr. Post's alleged confession.[2] (Docket # 24, Ex. I at A61). Mr. Post filed a motion to quash on 9 August 1984, arguing that any statement he made to either Mr. Holmok or Mr. Szanyi was protected by the attorney-client privilege. (Docket # 24, Ex. I at A61). Although the prosecution withdrew the subpoenas the next day, (Docket # 49, Ex. 72), it also filed a motion in limine to determine "whether Robert Holmok and Lewis Szanyi may testify in regards to communications made to them by the Defendant prior to planned polygraph examinations, and whether those communications are privileged under Ohio Revised Code Section 2317.02." (Docket # 49, Ex. 71). Mr. Post filed his own motion to exclude Mr. Holmok's testimony on 19 September 1984. (Docket # 49, Ex. 77).

[2]As Mr. Szanyi was not present for Mr. Holmok's interview of Mr. Post, it is not clear why he was subpoenaed.

A hearing was held on 20 November 1984, with testimony from Mr. Holmok and from Mr. Post's former pod-mate, Richard Slusher. Mr. Slusher testified that in August of 1984, Mr. Post told him that he signed a written confession during the polygraph examination with Mr. Holmok. (Docket # 78 at 29). According to Mr. Slusher, Mr. Post initiated the conversation with him because "he had to talk. He had to get something off his mind, and he wanted my opinion." (Docket # 78 at 32). Mr. Slusher testified that Mr. Post "said the guy was on his back quite a lot, and the guy knew he was lying, so he did the confession to get him off his back." (Docket # 78 at 29). Mr. Post allegedly admitted to Mr. Slusher that his confession was true. (Docket # 78 at 29-30). Mr. Slusher's understanding was that the polygraph examination had occurred in August, not May, because "Ron told [him] he just got done seeing a polygraph man" when Mr. Post initiated the conversation with Mr. Slusher. (Docket # 78 at 32, 34). Mr. Slusher also testified as follows:

Q: So maybe Ron is not telling you the truth? Is that possible?

A: I wouldn't known, ma'am.

Q: Maybe Ron wants to know how much he tells you goes back to the Prosecutor's Office. Is that possible?

A: It may be.

Q: It may be because that's what you were doing with any information, any conversations you had with Mr. Post, isn't it?

A: At first, no.

Q: And then you started taking it back to the Prosecutor's office? Isn't that true?

A: Yes, ma'am.

Q: That's because you have a long criminal record, and you're facing some heavy sentences. Isn't that true?

A: No, ma'am.

Q: And cooperation isn't helpful to you?

A: That is not my motive for going to the Prosecutor, no.

(Docket # 78 at 34).

After accepting briefs on the issue (Docket # 49, Ex. 89, 90), Judge Betleski ruled, on 29 November 1984, that Mr. Post's written statement and Mr. Holmok's testimony regarding Mr. Post's communications with him were admissible because Mr. Post's disclosure to Mr. Slusher waived any attorney-client privilege. (Docket 24, Ex. I at A-37). On 30 November 1984, at the beginning of the no-contest plea hearing, Judge Betleski permitted Mr. Duff to make an oral Motion to Suppress Statements to the Polygrapher and to incorporate the previous testimony, briefs, and arguments of the motion in limine. (Docket # 23, Ex. 1 at 6-10; Docket # 49, Ex. 11). The oral motion to suppress was "denied on the same grounds and rationale as the heretofore submitted Motion in Limine." (Docket # 49, Ex. 12; Docket # 23, Ex. 1 at 9).

In the months preceding the no-contest plea hearing, Mr. Post filed several pretrial motions, including motions to authorize the hiring of an investigator (Docket # 49, Ex. 41), for funds to obtain expert assistance in the mitigation phase (Docket # 49, Ex. 55), for a mental examination of Mr. Post (Docket # 49, Ex. 74), and for a pre-sentence investigation and report (Docket # 49, Ex. 74). Judge Betleski granted Mr. Post's motion to appoint an investigator, but denied his motion for funds to obtain expert assistance in the mitigation phase. (Docket # 49, Ex. 65). The Judge granted Mr. Post's motions for a mental examination and for a pre-sentence investigation and report.

(Docket # 49, Ex. 75). He was referred to the Nord Center for a mental exam and to Adult Probation for a PSR. (Docket # 49, Ex. 75).

On 25 October 1984, Dr. Thomas J. Haglund, Mr. Post's psychologist at the Nord Center, wrote a letter to Judge Betleski, in which he stated that Mr. Post had consistently maintained his innocence of the murder of Helen Vantz and that an assessment of certain mitigating factors was, therefore, impossible. (Docket # 24, Ex. I at A69).

C. The No Contest Plea

On 30 November 1984, the day after Judge Betleski's ruling on the admissibility of Mr. Holmok's testimony, Mr. Post notified the court of his "intent to waive a trial by jury and be tried by a court composed of three judges." (Docket # 49, Ex. 10). Judge Betleski appointed Judge Floyd Harris and Judge Joseph Cirigliano to sit with him and "to hear the proceedings commencing with the proffer of a plea and waiver of jury trial, and thereafter to decide all questions of fact and law pertinent to a finding of guilty or not guilty, together with the subsequent sentencing hearing . . . and imposition of sentence." (Docket # 49, Ex. 10).

That day, Mr. Post withdrew his plea of not guilty and pled no contest to all three charges against him and to all five specifications.

Prosecutor Robert Nagy began the hearing by saying, "the State would present, as required by law, a statement of facts or explanation of circumstances that is required to be presented in some detail . . . prior to the acceptance of a plea of no contest." (Docket # 23, Ex. 1 at 5-6). The prosecution read into the record the factual statement set forth above in Section I.A.1.

Ms. McGough presented the "certificate of counsel" to the court. The certificate, which she and Mr. Duff signed in open court in the presence of Mr. Post, certified that defense counsel explained the allegations of the indictment and the maximum penalty for each charge to the defendant, that Mr. Post understood that a no contest plea was an admission to the truth of the allegations contained in the indictment, that the plea was consistent with their advice, that the plea was voluntary, and that defense counsel recommended to the court that it accept the plea of no contest. (Docket # 23, Ex. 1 at 10-11; Docket # 49, Ex. 27). The certificate also stated that Mr. Post "understands that . . . his Attorneys will not contest nor deny the truth of the allegations contained in the prosecuting attorney's explanation of circumstances or statement of facts to the Court of three judges upon tendering said plea." (Docket # 23, Ex. 1 at 12; Docket # 49, Ex. 27).

Mr. Duff then offered two qualifications to the certificate of counsel. First, he wished to add one element to the prosecutor's statement of the facts – namely, that Judge Betleski had ruled Mr. Holmok's testimony admissible. (Docket # 23, Ex. 1 at 12-13). According to Mr. Duff, this was a "crucial omission because we feel that's a crucial piece of evidence, and we want the record to reflect that Detective Holmok's testimony is part and parcel of this plea and we intend to take that up on appeal."[3] (Docket # 23, Ex. 1 at 14). Mr. Nagy responded that he believed the statement of facts established all of the elements of the charged offenses without the addition and that he was not relying on

[3] This objection was raised again by Mr. Duff and Ms. McGough at the conclusion of the prosecution's reading of the statement of facts. (Docket # 23, Ex. 1 at 58-59).

Mr. Post's statement to Mr. Holmok to bolster the statement of facts. (Docket # 23, Ex. 1 at 13-15).

Second, Mr. Duff stated that, despite the certificate of counsel, Mr. Post did not "agree or concur" with the prosecution's statement of the facts.

> MR. DUFF: I want to make it clear, Your Honor, that our no contest plea, as I understand the law, is that admission of the facts contained in the indictment, and I don't want that to be misconstrued in any way that we agree or concur in their statement of facts; that they're not a stipulated statement of facts, they're the prosecutor's statement of facts.
>
> JUDGE HARRIS: You don't have to agree or concur, but you were afforded the opportunity to present whatever you wanted to present in contradiction thereto; and you haven't presented anything, so the only thing this Court has is the statement of [the prosecutor].
>
> MR. DUFF: All right. As long as that's understood.

(Docket # 23, Ex. 1 at 59-60).

Referring to "extensive pretrial negotiations in this case," Mr. Duff then explained that defense counsel reviewed the nine-page petition to withdraw the plea of not guilty and enter a plea of no contest in detail with Mr. Post and that Mr. Post understood the contents of the petition and signed it.[4] (Docket # 23, Ex. 1 at 15-16).

At this point, Judge Betleski spoke with Mr. Post to determine whether his plea was voluntary. Specifically, he asked whether Mr. Post could read and write the English language, whether he understood each of the charges and the elements contained in the indictment, whether he understood the rights he was relinquishing by pleading no contest, whether he was satisfied with his attorneys, whether Mr. Post's lawyers had fully informed him about all legal matters, and whether, in turn, Mr. Post had informed them of

[4] The petition is Exhibit YY of Docket # 27.

all factual matters. (Docket # 23, Ex. 1 at 17-29). Mr. Post also agreed with the Judge that the court was required to take an explanation of circumstances from the prosecutor and that the indictment and explanation of circumstances contained sufficient facts to support a conviction.[5] (Docket # 23, Ex. 1 at 22-23). After this inquiry, Judge Betleski reminded Mr. Post that he could withdraw his no contest plea any time before its acceptance by the court.[6] (Docket # 23, Ex. 1 at 24). When discussing the possible penalties for each count, Judge Betleski expressly listed death as a possible sentence for each of the two counts of aggravated murder with specifications on seven different occasions. (Docket # 23, Ex. 1 at 29, 39-40). Moreover, Mr. Post answered yes to the question, "Are you prepared to accept any punishment permitted by law which this Court sees fit to impose."[7] (Docket # 23, Ex. 1 at 42).

Judge Betleski also engaged in the following exchange with Mr. Post:

> JUDGE BETLESKI: Now, you're declaring that no officer of this Court, any counsel or any Court, has promised or suggested that you will receive a lighter sentence, probation, or any other form of leniency in exchange for your no contest plea.
>
> If anyone did make such a promise, I know that he or she had no authority to do that.
>
> Now, that's important. I don't know of anybody that's offered you either a lighter sentence or probation or any other forms of leniency. So that, that would be considered as an inducement to you to plead, you follow?

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[5] Judge Betleski further noted, "In this case there will be no witnesses; there will just be a narration of the facts." (Docket # 23, Ex. 1 at 26).

[6] The Judge reiterated this point later in the inquiry. (Docket # 23, Ex. 1 at 42).

[7] Also, in the petition to enter a plea of no contest, Mr. Post affirms, "I am prepared to accept any punishment permitted by law which this Court sees fit to impose." (Docket # 27, Ex. YY at ¶ 18).

THE DEFENDANT: I think so, Your Honor.

JUDGE BETLESKI: In other words, if someone promised you something less or some advantage. Usually I ask that question. Did anyone offer you any kind of a reward or benefit for this plea?

THE DEFENDANT: No, they didn't, Your Honor.

(Docket # 23, Ex. 1 at 34-35). Mr. Post verbally affirmed once more that no representations or promises were made to him in order to convince him to plead no contest.[8] (Docket # 23, Ex. 1 at 37-38).

After concluding that Mr. Post was "aware of his rights and the nature of the charges against him," the three-judge panel accepted the no contest plea and found Mr. Post "guilty of all counts and each and every specification thereto as set out in the indictment." (Docket # 23, Ex. 1 at 44, 51, 60). The three judges then signed a judgment entry of conviction. (Docket # 24, Ex. B).

D. Sentencing

1. Pre-Sentence Investigation Report

The probation department submitted a PSR and supplemental PSR to the three-judge panel prior to sentencing. Aside from laying out the factual background of the case, as discussed in Section I.A.2., the PSRs included sections on victim impact, Mr. Post's criminal history, and the defendant's personal background.

[8] Additionally, in his change of plea petition, Mr. Post stated, "I declare that no officer of this Court or any attorney has promised or suggested that I will receive a lighter sentence, probation, or any other form of leniency in exchange for my 'no contest' plea, and if anyone did make such a promise, I know that he/she had no authority to do it." (Docket # 27, Ex. YY at ¶ 13).

In the initial PSR, the probation officer summarized a conversation she had with Helen Vantz's son, William, and his wife, Sheri. (Docket # 24, Ex. I at A90-A91). The PSR noted,

> Mr. Vantz stated that initially his emotions had been mixed regarding the death penalty for the defendant, but over time he became convinced that the defendant should receive the death penalty. They indicated that Helen Vantz was never given an opportunity for her life, and that they know that she would have just given the defendant the money during the robbery. The defendant did not, they emphasized, need to have shot and killed Helen Vantz. The Vantz's [sic] also indicated that Helen Vantz was executed for $100.00; and emphasized the biblical "eye for an eye." They stated that Helen Vantz had no appeal rights for her life. Both Mr. and Mrs. Vantz indicated that they did not want the defendant on the street, ever again.

(Docket # 24, Ex. I at A-90). Mr. and Mrs. Vantz also explained that Helen Vantz lost the opportunity to spend Christmas with their family, which she had been unable to do for the past 13 years because of her work schedule. (Docket # 24, Ex. I at A90). The PSR relayed that Michael Vantz lost his only surviving and actively-involved grandparent and that the Vantz family felt that "[t]he scars of her loss will always be a reminder prior to the holidays and carried through the holidays, casting its dark cloud." (Docket # 24, Ex. I at A91).

The PSRs also presented Mr. Post's criminal history. The original PSR shows arrests for vandalism, shoplifting, disorderly conduct, possession of dangerous ordinance, theft, and assault. (Docket # 24, Ex. I at A95). The supplemental PSR discussed the charges in greater detail. It explained that the shoplifting charge involved the defendant pushing a store manager out of his way. (Docket # 24, Ex. I at A98). The possession of dangerous ordinance charge involved a sawed-off shotgun. (Docket # 24, Ex. 1 at A99). Mr. Post was charged with assault because he punched a woman in

the face after she cut off his motorcycle with her car. (Docket # 24, Ex. I at A99). A police informant indicated that Mr. Post "had been bragging about having hit a woman in the face." (Docket # 24, Ex. 1 at A100).

The original PSR also discussed the defendant's personal background. It reported that Mr. Post was unemployed, that his common law wife, Sharon Harsh, had completed a high risk pregnancy, and that her two children were afflicted with Sudden Infant Death Syndrome. (Docket # 24, Ex. I at A93). The PSR stated that Mr. Post had used several illegal drugs, including amphetamines, barbituates, LSD, cocaine, and THC, and that Mr. Post had not received any treatment for his drug abuse. (Docket # 24, Ex. I at A96).

2. Psychological Evaluation

On 16 January 1985, Dr. Thomas Haglund, the psychologist from Nord Center, sent a second letter to Judge Betleski. (Docket # 24, Ex. I at A66-A68; Docket # 27, Ex. XX). According to this letter, Ms. McGough had spoken with Mr. Post and had stressed the importance of talking "candidly" about "his actions on the night of Mrs. Vance's [sic] death." (Docket # 24, Ex. I at A66). "With this in mind," Dr. Haglund spoke again with Mr. Post on 23 December 1984 for approximately one hour. (Docket # 24, Ex. I at A66). However, he reported, "the bottom line is that Mr. Post maintains his innocense [sic] and, therefor [sic], once again, I find that I am unable to render any opinion as to mitigating factors as these relate to the commission of the offense itself." (Docket # 24, Ex. I at A66).

Dr. Haglund was "able to say more about Mr. Post's character, history and background that may help the court in its determination of whether the death penalty is appropriate." (Docket # 24, Ex. I at A66). He explained that Mr. Post was taken to Nord Center in 1975 "because of problems in school, minor mischief and a tendency to lose his temper, which Mr. Post . . . described as anger 'that came out of nowhere . . . I'd punch walls and doors.'" (Docket # 24, Ex. I at A67). Dr. Haglund also noted that Sharon Harsh's two children had respiratory problems that place them at high risk for Sudden Infant Death Syndrome and that this resulted in high medical bills. (Docket # 24, Ex. I at A67). As a result of the neighborhood in which they lived, the couple often was harassed and threatened by neighbors. (Docket # 24, Ex. I at A67).

Moreover, Dr. Haglund relayed that "Mr. Post has been involved with drugs and the drug scene since high school." (Docket # 24, Ex. I at A67). Mr. Post earned extra money as a middle man for drug sellers and users. (Docket # 24, Ex. I at A67). He used many drugs, some of which "to lose weight and to calm him down from the effects of weight-reducing drugs." (Docket # 24, Ex. I at A67). As a result of this behavior, Mr. Post's mother apparently favored his brother. (Docket # 24, Ex. I at A67).

Dr. Haglund concluded as follows:

> My overall clinical impression of Mr. Post, based on several interviews, is that he is not a psychiatrically disturbed individual, that is, his thinking is coherent and he is able to discriminate between reality and fantasy and is untroubled by hallucinations or delusional ideas. There is nothing in his history to suggest that he has ever been psychiatrically disturbed. Rather, he impresses more as a marginally adjusted individual who copes with life's problems ineffectively and who lacks the maturity and sound judgment that are common to reasonably well-adjusted adults. Up until now, his past conduct does not appear to have been seriously anti-social or violent. His involvement in anti-social behavior has taken the form of small-time drug dealer or "middle man" as he characterizes it, though with the usual associations with unsavory characters that is part and parcel of dealing in

> drugs. There is little, if anything, in his history, character and background that would necessarily have marked him, prior to Mrs. Vance's [sic] death, as a potential murderer or violent individual, though it is tempting to read dangerousness into his character after the fact and with the benefit of hindsight. For example, one might be tempted to read something into his mention of temper problems as a youth or the resentment he felt toward his mother. There is not enough data for me to state with much confidence that his killing of Mrs. Vance [sic], keeping in mind that he maintains his innocense [sic], had anything to do with underlying emotional conflicts or, again, anti-social traits.

(Docket # 24, Ex. I at A67-A68).

3. The Sentencing Hearing

A capital sentencing hearing[9] was held on 12 March 1985 and 13 March 1985. During the hearing, Judges Betleski, Cirigliano, and Harris heard argument from the prosecution, arguments and testimony from the defense, and a statement from Mrs. Vantz's son.

Mr. Nagy began by electing to proceed for sentencing with counts one (aggravated robbery) and two (aggravated murder with prior calculation and design with a specification of commission of the murder as the principal offender during the commission of a felony). (Docket # 23, Ex. 2 at 7-8, 25). The prosecution asked the court to sentence Mr. Post to the maximum time possible on all counts and specifications and, furthermore, "asked that the death penalty be imposed and seriously considered by this Court." (Docket # 23, Ex. 2 at 11). In seeking the death penalty, the prosecution relied on the aggravating factor set forth in O.R.C. § 2929.04(A)(7):

[9] Capital sentencing hearings also are referred to as mitigation hearings or penalty hearings.

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt. . . .
>
> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery . . . and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(Docket # 23, Ex. 2 at 13). According to Mr. Nagy, the "uncontested statement of facts" presented at the change of plea hearing and accepted by the court established the existence of this aggravating factor because it established that Mr. Post acted with prior calculation and design and that he was the principal offender in the aggravated murder. (Docket # 23, Ex. 2 at 7, 11, 13, 15).

In response, Mr. Duff argued that, under this aggravating factor, Mr. Post acting with prior calculation or design is irrelevant because the prosecution alleged that Mr. Post was the principal offender. (Docket # 23, Ex. 2 at 16-19, 23-24). The court agreed and limited the prosecution to proceeding with the principal offender element of the aggravating factor. (Docket # 23, Ex. 2 at 24).

Ms. McGough then presented stipulations regarding mitigating factors. It was stipulated that the defendant was 24 years of age at the time of the murder. (Docket # 23, Ex. 2 at 26). The prosecution and defense also agreed that Mr. Post had no prior felony record and no delinquency adjudications. (Docket # 23, Ex. 2 at 26). Ms. McGough further noted that in capital cases in Ohio in which a plea of guilty or no contest was entered, the death penalty was imposed in only one case. (Docket # 23, Ex. 2 at 28). It was stipulated that the death penalty had not been imposed in Lorain County

under the 1981 death penalty statute. (Docket # 23, Ex. 2 at 28, 30). Ms. McGough then asked that the panel accept and consider the PSR and psychological evaluation from Nord Center. (Docket # 23, Ex. 2 at 27).

Next, the defense called four witnesses: Sharon Harsh Post (the defendant's common law wife), Ruth Post (his stepmother), Helen Post (his mother), and Jane Core (a death penalty statistician at the Ohio Public Defender Commission).

Sharon Harsh Post testified that her two children are "crib death babies" and that her son "has heart trouble, stomach problems, [and] has already been involved in one surgery." (Docket # 23, Ex. 2 at 32). She stated that Mr. Post "was fantastic" with the children. (Docket # 23, Ex. 2 at 32). Sharon testified that he was able to control his temper, was kind and compassionate, was loving and caring, and that he helped people. (Docket # 23, Ex. 2 at 32, 34). She stated that he was not a villain or a troublemaker. (Docket # 23, Ex. 2 at 34). At the time of the murder, Sharon was in the midst of a very hard and high-risk pregnancy. (Docket # 23, Ex. 2 at 33). Mr. Post also was unemployed at the time. (Docket # 23, Ex. 2 at 32). On cross-examination, Sharon denied that her husband used illegal drugs other than marijuana. (Docket # 23, Ex. 2 at 36). On re-direct, Sharon admitted that he "smacked [her] a couple of times," but never actually hurt her or the children. (Docket # 23, Ex. 2 at 43).

Ruth Post testified that she had not seen Mr. Post since 1981, when his father passed away. (Docket # 23, Ex. 2 at 47). Before that, she saw him frequently. (Docket # 23, Ex. 2 at 48). According to her, he never exhibited any anti-social behavior or propensity toward violence. (Docket # 23, Ex. 2 at 48). She testified that he was soft-hearted and good-natured and that he was always smiling and laughing. (Docket # 23,

Ex. 2 at 48). Ruth claimed that he never lost his temper and that she never had to discipline him. (Docket # 23, Ex. 2 at 48). She thought he could be rehabilitated. (Docket # 23, Ex. 2 at 49).

Mr. Post's mother, Helen Post, testified that he loved his wife and children. (Docket # 23, Ex. 2 at 55). She stated that he never exhibited anti-social behavior or a propensity toward violence. (Docket # 23, Ex. 2 at 56). She also believed that Mr. Post could be rehabilitated because she "never really had that trouble with him" and because "[h]e loves people." (Docket # 23, Ex. 2 at 58).

Jane Core was the final defense witness. As a death penalty statistician, she tracked the capital cases in the state of Ohio. (Docket # 23, Ex. 2 at 60). Ms. Core testified that, of the 345 indictments charging aggravated murder with death specifications filed since October 1981, twenty defendants pled guilty or no contest to aggravated murder with a death specification. (Docket # 23, Ex. 2 at 64). Specifically, one defendant pled no contest, eighteen pled guilty, and one pled guilty to the aggravated murder but no contest to the specifications. (Docket # 23, Ex. 2 at 64). She reported that only one of these twenty defendants was sentenced to death: John David Stumpf, for an attempted double homicide. (Docket # 23, Ex. 2 at 65-67).

Mr. Post then made an unsworn statement to the court. He stated that he was "very deeply sorry" for the loss to the Vantz family. (Docket # 23, Ex. 2 at 68). He said, "I wish that somehow time could be reversed and I could make decisions differently." (Docket # 23, Ex. 2 at 68). Mr. Post apologized again and asked for forgiveness and mercy. (Docket # 23, Ex. 2 at 68-69). He stated, "I can offer to this Court no rational explanation for my involvement in the death of Mrs. Helen Vantz." (Docket # 23, Ex. 2 at

69). He finished by saying, "If given the opportunity, I would strive to make a contribution that would be positive and perhaps helpful to others." (Docket # 23, Ex. 2 at 69).

In rebuttal, Mr. Nagy sought to admit into evidence an audio tape of a telephone conversation between Mr. Post and a Byron Martin, which was recorded while Mr. Post was incarcerated in Lorain County Jail. (Docket # 23, Ex. 2 at 71). The court sustained defense counsel's objection to the admission of the tape. (Docket # 23, Ex. 2 at 87). Mr. Nagy then proffered it for the record. (Docket # 23, Ex. 2 at 87-88).

At this point, Ms. McGough stated, "We would now request that the victim's family be permitted to speak."[10] (Docket # 23, Ex. 2 at 88). William Vantz, Helen Vantz's son, made an oral statement. He explained that the murder scared his family and that his mother was "a caring, loving woman who would do anything for anyone" and who "would never, ever hurt anyone." (Docket # 23, Ex. 2 at 89-90). He stated,

> She enjoyed her life to the fullest, and for it to be taken in such a way is just inexcusable. I cannot in my heart forgive Mr. Post; I never will. There is no way I could do that. He took from me my mother, and my mother was – Mr. Post had a chance to defend himself; she never got that chance. She was executed, and I feel the only just punishment for execution is execution. My family feels that way, my cousins, my brothers, our wives, friends of the family. . . I'm going to leave it in your hands to do what's right, what's just. I'm not versed in the law, but yet in my heart I feel the only thing to do is to give Mr. Post what he deserves.

(Docket # 23, Ex. 2 at 90-91).

Mr. Nagy presented his closing argument. He noted that a death sentence would be reviewed by the Ohio Court of Appeals and the Supreme Court of Ohio. (Docket #

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[10] At the beginning of the hearing, Mr. Nagy expressed his belief that Helen Vantz's family should be given an opportunity to address the court. He stated, "the procedure, I believe, is that at some point the Court would address them and ask if they had any statement to make, not so much in the nature of evidence in the case but rather as feelings of the family." (Docket # 23, Ex. 2 at 4).

23, Ex. 2 at 93). He characterized the aggravating circumstance as extremely strong and dismissed the defense's attempt to present mitigating factors. (Docket # 23, Ex. 2 at 94-96).

Mr. Duff made several arguments. He argued that, if imprisoned rather than executed, Mr. Post could not be released until he was at least 68 years old. (Docket # 23, Ex. 2 at 97). Mr. Duff contended that Mr. Post was a youthful offender and that he lacked a significant criminal history. (Docket # 23, Ex. 2 at 98-100). He presented a proportionality argument: that this murder was less heinous than other Ohio capital cases in which the defendant pled guilty or no contest and in which the death penalty was not imposed. (Docket # 23, Ex. 2 at 101). He pointed out that no other defendant had received the death penalty in Lorain County. (Docket # 23, Ex. 2 at 102). Mr. Duff suggested that Mr. Post's no contest plea was itself a mitigating factor. (Docket # 23, Ex. 2 at 102).

Ms. McGough echoed Mr. Duff's arguments. She also asserted that, although Ralph Hall was at least an accessory after the fact, he was not even indicted. (Docket # 23, Ex. 2 at 104).

The court re-convened the next morning. The judges found that the State had proved one aggravating circumstance beyond a reasonable doubt: that the murder was committed while Mr. Post was committing aggravated robbery and he was the principal offender in the commission of the aggravated murder. (Docket # 23, Ex. 2 at 110). The court specifically noted that it did not consider the element of prior calculation or design. (Docket # 23, Ex. 2 at 110). The court then discussed the relevant mitigating factors. The panel "considered the age of the Defendant and found that he was not a

youthful offender." (Docket # 23, Ex. 2 at 110). It "found no delinquency adjudications, but the misdemeanor convictions reflected a tendency to violence." (Docket # 23, Ex. 2 at 110). The panel decided that the no contest plea "failed as an admission of the offense." (Docket # 23, Ex. 2 at 111). The court found the defense's proportionality argument to be inapplicable as a mitigating factor. (Docket # 23, Ex. 2 at 111). The court found no evidence to support defense counsel's statement regarding an unindicted supplier of the weapon. (Docket # 23, Ex. 2 at 111). As for Mr. Post's unsworn statement, "[t]he panel considered this factor in mitigation of the possible sentence." (Docket # 23, Ex. 2 at 111). The court concluded, "the panel finds unanimously that the State has proved the aggravating circumstances beyond a reasonable doubt and the Defendant did not prove the mitigating factors by a preponderance of the evidence. (Docket # 23, Ex. 2 at 111). The court then sentenced him to death by electrocution. (Docket # 23, Ex. 2 at 111-112).

The next day, on 14 March 1985, the court realized that it had not sentenced Mr. Post on the aggravated robbery count. (Docket # 49, Ex. 95). On 20 March 1985, the three-judge panel sentenced Mr. Post to ten to twenty-five years imprisonment for the aggravated robbery and three years imprisonment for the firearm specification. (Docket # 23, Ex. 3 at 8). That day, the court issued its written sentencing opinion, which re-iterated the findings discussed above. (Docket # 24, Ex. C; Docket # 49, Ex. 14).

E. Direct Appeal

1. Ninth District Court of Appeals

On 22 March 1985, Judge Betleski appointed Michael Duff and Daniel Wightman as Mr. Post's appellate counsel. (Docket # 49, Ex. 97). Mr. Post filed a notice of appeal on 19 April 1985. (Docket # 49, Ex. 99). Mr. Post's execution was stayed pending appeal. (Docket # 49, Ex. 102).

Mr. Post raised the following assignments of error in the Ninth District Court of Appeals:

> FIRST ASSIGNMENT OF ERROR
>
> > The trial court erred by not suppressing a confidential communication between the appellant and a defense-retained expert.
>
> SECOND ASSIGNMENT OF ERROR
>
> > The trial court erred in not complying with Ohio Revised Code Section 2929.03(F), which mandates that the panel of three judges state the reasons why the aggravating circumstances outweighed the mitigating factors when the sentence of death is imposed.
>
> THIRD ASSIGNMENT OF ERROR
>
> > The trial court erred in not complying with Ohio Revised Code Section 2929.03(F), which mandates that the court state in its opinion the court's findings as to the existence of any of the mitigating factors denominated in Ohio Revised Code Section 2929.04(B).
>
> FOURTH ASSIGNMENT OF ERROR
>
> > The trial court erred by not requiring the prosecution to prove beyond a reasonable doubt that the aggravating circumstance the defendant was found guilty of committing was sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.
>
> FIFTH ASSIGNMENT OF ERROR
>
> > The court erred to the prejudice of the Appellant by failing to consider as mitigating factors the Appellant's age, his lack of prior felony convictions, his relationship with his wife, children, mother, and stepmother, and his plea of no contest.

SIXTH ASSIGNMENT OF ERROR

> The panel of three judges erred in imposing the death sentence, which under the facts of this case, is inappropriate, excessive, and disproportionate to the penalty imposed in similar cases.

SEVENTH ASSIGNMENT OF ERROR

> The trial court erred in finding that the aggravating circumstance outweighed beyond a reasonable doubt the mitigating factors adduced at the sentencing hearing.

(Docket # 24, Ex. D).

On 15 January 1986, the Court of Appeals affirmed both the conviction and the sentence of death. (Docket # 24, Ex. F). The Court of Appeals rejected Mr. Post's seven assignments of error and independently found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. It also determined that the application of the death penalty was not excessive or disproportionate to the penalty imposed in similar cases. (Docket # 24, Ex. F at 23).

2. Supreme Court of Ohio

On 12 February 1986, Mr. Post filed a notice of appeal with the Supreme Court of Ohio. (Docket # 24, Ex. G). The Court of Appeals permitted Mr. Duff and Mr. Wightman to withdraw as appellate counsel, and appointed the Ohio Public Defender's Office to represent Mr. Post before the Supreme Court of Ohio. (Docket # 24, Ex. H).

Mr. Post presented twelve propositions of law to the Supreme Court of Ohio:

PROPOSITION OF LAW NO. 1

The State's exploitation of confidential relationships and use of confidential information violated defendant's privilege against self-incrimination, right to effective assistance of counsel, right of meaningful access to the courts, and due process rights, under Sections 10 and 16, Article 1, Ohio Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. 2

Appellant's plea of no contest did not represent a voluntary and intelligent choice among the alternative courses of action open to defendant. Therefore, the plea is invalid and acceptance of such plea constitutes plain error under Sections 10 and 16, Article 1, Ohio Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. 3

Appellant was denied the effective assistance of counsel, which worked to his actual and substantial disadvantage, when the lawyer representing him acted outside the range of professionally competent assistance in violation of Section 10, Article 1, Ohio Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. 4

The sentencing panel's failure to consider all the evidence presented in mitigation was a violation of appellant's rights under R.C. 2929.04(B) and the Eighth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. 5

Appellant's rights to due process, equal protection, and to be free from infliction of cruel and unusual punishment were violated by the arbitrary or capricious imposition of the death penalty in this case in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. 6

The trial court erred in not complying with R.C. 2929.03(F), which mandates that the court state in its opinion the court's findings as to the existence of any of the mitigating factors denominated in R.C. 2929.04(B) and its reasons why the mitigating factors are outweighed by the aggravating circumstances, violating appellant's due process rights under the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION OF LAW NO. 7

Under R.C. 2929.05, the court must independently weigh the evidence and must reverse the sentence of death where the mitigating factors are not outweighed by the aggravating circumstance.

PROPOSITION OF LAW NO. 8

The proportionality review that this court must conduct in the present capital case pursuant to R.C. 2929.05 violates Sections 5 and 10, Article I, of the Ohio Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. 9

The trial court erred by failing to scrupulously follow the procedure proscribed in Crim. R. 11(C)(3), requiring a trial de novo as to the existence of specified aggravating factor, thereby violating appellant's right to due process and meaningful appellate review.

PROPOSITION OF LAW NO. 10

Ohio's mandatory sentencing scheme prevented the sentencing panel from deciding whether death was the appropriate punishment in violation of appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

PROPOSITION OF LAW NO. 11

Ohio's statutory provisions governing the imposition of the death penalty are unconstitutional under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Sections 2, 9, 10, and 16, Article I, of the Ohio Constitution.

PROPOSITION OF LAW NO. 12

> It is a violation of R.C. 2943.041 and prejudicial error for a trial court to consider an inflammatory victim impact statement in its sentencing decision.[11]

(Docket # 24, Ex. I; Docket # 25, Ex. R at 757).

On 16 September 1987, the Supreme Court of Ohio affirmed Mr. Post's conviction and death sentence. (Docket # 25, Ex. R; 32 Ohio St.3d 380 (1987)). The court found no prejudicial error. After conducting a de novo review, the court independently found that the aggravating circumstance outweighed the factors presented in mitigation beyond a reasonable doubt. It also concluded that the death sentence was appropriate in this case and neither excessive nor disproportionate to the penalty imposed in comparable cases. (Docket # 25, Ex. R at 768).

On 25 September 1987, Mr. Post moved for reconsideration on the issues of the victim impact statement, attorney-client privilege waiver, and ineffective assistance of counsel. (Docket # 25, Ex. T). The Supreme Court of Ohio denied rehearing on 28 October 1987. (Docket # 25, Ex. V).

3. United States Supreme Court

Mr. Post filed his petition for writ of certiorari with the United States Supreme Court on 28 December 1987. (Docket # 25, Ex. W). He presented the following questions:

- Whether this Court's decision in Booth v. Maryland that it is prejudicial error to admit victim impact evidence in the sentencing stage of a death penalty trial is equally applicable to a case tried before a three judge panel as one tried by a jury?

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[11] This last proposition of law was not presented in Mr. Post's original merit brief. It was added later in a supplemental brief.

- Whether Petitioner's Fifth and Sixth Amendment constitutional rights were violated by holding admissible his self-incriminating statements made to a defense retained polygraphist?
- Whether a death sentence based on a plea of no contest which was not knowingly, intelligently, and voluntarily made is constitutionally valid?

(Docket # 25, Ex. W at i). Over the dissent of Justices Marshall and Brennan, the United States Supreme Court denied Mr. Post's petition. (Docket # 51, Ex. 212; Docket # 25, Ex. Y). Mr. Post then filed a petition for rehearing (Docket # 25, Ex. Z), which was denied on 18 April 1988 (Docket # 25, Ex. AA).

F. Ohio Postconviction Proceedings

1. Court of Common Pleas

a. Nine Causes of Action

On 25 October 1988, Mr. Post filed a petition to vacate or set aside his sentence with the Lorain County Court of Common Pleas. (Docket # 25, Ex. BB; Docket # 48, Ex. 5). He presented nine causes of action:

FIRST CAUSE OF ACTION

> The judgment against Petitioner Post is void or voidable because he was denied the effective assistance of counsel in the pretrial investigation, negotiation of the guilty plea, and the entrance of the no contest plea.

SECOND CAUSE OF ACTION

> The judgment against Petitioner Post is void or voidable because the plea entered by Petitioner Ronald Post was not a knowing and intelligent choice among the alternative courses of action open to Petitioner.

THIRD CAUSE OF ACTION

The judgment against Petitioner Post is void or voidable because he was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Section 10, Article I, of the Ohio Constitution.

FOURTH CAUSE OF ACTION

Petitioner Post was denied his right to the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution due to the State's use of a government informant while Petitioner was in custody and after his indictment.

FIFTH CAUSE OF ACTION

The judgment against Petitioner Post is void or voidable because he was denied the effective assistance of counsel in the mitigation phase of the trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution.

SIXTH CAUSE OF ACTION

The judgment against Petitioner Post is void or voidable because he was denied the right to the assistance of experts as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Section 10, Article I of the Ohio Constitution and R.C. 2929.024.

SEVENTH CAUSE OF ACTION

The judgment against Petitioner Post is void or voidable because he was denied his right to an effective determination of his sentence due to the fact that the psychologist who evaluated him for mitigating factors did not provide a competent and appropriate psychiatric evaluation.

EIGHTH CAUSE OF ACTION

The judgment against Petitioner Post is void or voidable because his Eighth Amendment rights against cruel and unusual punishment were violated when the victim's son was allowed to tell the court the impact that his mother's death had on him and his family; a victim impact statement was included in the presentence investigation;

and a letter from the victim's family was included in the presentence investigation.

NINTH CAUSE OF ACTION

The judgment against Petitioner Post is void or voidable because the prosecutor suppressed evidence favorable to and requested by the Petitioner in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

(Docket # 25, Ex. BB).

b. Exhibits

Mr. Post attached multiple exhibits to his brief in support of state postconviction relief. Exhibit A was an affidavit from attorney Samuel B. Weiner, who opined that Mr. Post's trial counsel were ineffective. Exhibit B was an affidavit from Ernest Hume, who stated that the prosecutor had offered Mr. Post "a deal," in which he would plead guilty to aggravated murder with death penalty specifications and receive a sentence of thirty years to life. In another affidavit, attorney Daniel Wightman expressed his view that the admission of Mr. Holmok's testimony was "not a very strong appellate issue due to the fact that the statement of facts given by the prosecutor did not include any reference to the polygraph examiner." (Docket # 25, Ex. BB at Ex. C). In Exhibit D, one of Mr. Post's appellate counsel declared that, in preparing Mr. Post's direct appeal to the Supreme Court of Ohio, he had spoken with Ms. McGough, who told him that, based on her conversation with Judge Betleski, she was convinced that he would not impose the death penalty because of his religious beliefs and that she was comfortable with Mr. Post entering a no contest plea.

Exhibit E was an affidavit of Mr. Post. Mr. Post stated that Mr. Hume had negotiated a deal whereby he would plead guilty and receive a sentence of thirty years to life. He further asserted that Ms. McGough informed him that Judge Betleski would not impose the death penalty if he entered a plea to the charges and that this information led him to enter a no contest plea. Mr. Post concluded, "I would not have entered a no contest plea and instead would have proceeded with a jury trial if I had known that such a plea would not guarantee that I would receive a life sentence." (Docket # 25, Ex. BB at Ex. E).

Exhibit F was an affidavit from Verona Post, Mr. Post's stepmother. She stated that she spoke with Mr. Post a week before he entered his no contest plea. During the telephone conversation, Mr. Post said, "they had told him that if he plead, his life would be spared." (Docket # 48, Ex. 5 at Ex. F). According to Mrs. Verona Post, at a meeting a few days later, Ms. McGough stated that it was her opinion that Judge Betleski would not impose the death penalty. Mrs. Post also stated that she was informed by Mr. Duff that she would testify at the mitigation hearing three days before the hearing. She claimed that no one from the defense team ever contacted her for background information on her stepson and that Mr. Duff prepared her and the other mitigation witnesses to testify as a group for ten minutes before the hearing. Mrs. Post further stated, "Mr. Duff told us what to testify to. Mr. Duff wanted us to make Ron look good, which would have caused us to give inaccurate testimony." (Docket # 48, Ex. 5 at Ex. F).

Exhibit G was an affidavit from Patricia Post, Mr. Post's sister-in-law. She stated that, on the day of the no contest plea, Ms. McGough and Mr. Duff differed as to

whether a no contest plea or guilty plea would be entered. According to Patricia Post, Ms. McGough and Mr. Duff said that Mr. Post would not receive the death penalty. She stated that Mr. Post was confused as to the nature of the proceedings.

In his Exhibit H affidavit, Gary Post, Mr. Post's brother, stated that he spoke with Mr. Post on the day of the no contest plea and that Mr. Post was crying and did not know what to do. Gary Post also stated that he met with Ms. McGough the day after the plea. He claimed that Ms. McGough "stated that because of Judge Betleski's views, Ron, under no circumstances, would receive the death penalty." (Docket # 48, Ex. 5 at Ex. H). According to Gary Post, Ms. McGough "advised and permitted Ron to enter any plea" because of Judge Betleski's views concerning the death penalty. (Docket # 48, Ex. 5 at Ex. H).

Exhibit I was Mr. Duff's affidavit. Mr. Duff stated that Ms. McGough told him that, during her conversation with Judge Betleski and Mr. Nagy, the Judge told her that he would view a no contest plea as a mitigating factor, that the Pope was against the death penalty, and that "a plea of no contest would avoid the death sentence in all likelihood." (Docket # 48, Ex. 5 at Ex. I). Allegedly, after the substance of this conversation was relayed to Mr. Post, he made the decision to enter a no contest plea. Mr. Duff stated his belief that Mr. Post's plea was not knowing, intelligent, and voluntary.

Exhibit J was an affidavit from Nancy Schmidtgoessling, Ph.D., a clinical psychologist with experience in the mitigation phase of capital cases. She contends that defense counsel did not adequately research Mr. Post's background and that they did not collect any records or collateral information in preparation for the mitigation hearing.

Dr. Schmidtgoessling then discussed the background information that she considered to be available to Mr. Post's attorneys for use at the mitigation hearing.

Similarly, in the Exhibit K affidavit, a mitigation specialist from the Ohio Public Defender Commission listed the records he was able to obtain and the persons he was able to interview regarding Mr. Post's background.

Two additional affidavits from Mr. Post's brother are attached as Exhibits L1 and L2. Gary Post stated that neither Mr. Duff nor Ms. McGough elicited any background information regarding his brother from him prior to or during the mitigation hearing. He asserted that his mother orally provided Mr. Duff with a list of potential character witnesses, but Mr. Duff took no written notes. Gary Post then lists the background information that he could have provided had he been asked.

Helen Post, Mr. Post's mother, provided two affidavits, as well. She stated that defense counsel never interviewed her regarding her son's background or upbringing. She also claimed that she verbally provided Mr. Duff with a list of potential character witnesses, but he did not take written notes. Helen Post stated that Mr. Duff reviewed her mitigation hearing testimony with her just prior to the hearing for ten minutes. According to her, Mr. Duff merely asked her, "What would you say?" In addition, Helen Post stated that her son was always big for his age, that he was teased by classmates as a child, and that he was jealous of his younger brother, Gary. She asserted that "Ron was very conscious about his weight and was taking diet pills to lose weight." (Docket # 48, Ex. 5 at Ex. N).

In Exhibit O, Ruth Post, Mr. Post's stepmother, opined that Helen Post could not control Mr. Post when he was growing up. In Exhibits P through X, relatives, neighbors,

and friends of Mr. Post each stated that defense counsel never contacted them to obtain background information on Mr. Post. In their affidavits, they discussed how Mr. Post's parents did not discipline him, his use and sale of drugs, and the teasing he received at school because of his size.

In Exhibit Y, Patricia Post, Mr. Post's sister-in-law, stated that Mr. Duff reviewed her mitigation hearing testimony and that of Ruth Post and Sharon Harsh for a total of ten minutes just prior to the hearing. Patricia Post claimed that the witnesses were "told at the same time to testify as to the exact same details." (Docket # 48, Ex. 5 at Ex. Y).

Exhibit CC was a 29 July 1984 letter from Richard Slusher, who was in Mr. Post's pod at the Lorain County Jail. The letter began:

> To Whom it may concern,
>
> No more than 20 minutes I finally got the complete story from Ron Post as to what happened on the night of the murder Dec. 15, 1983.

(Docket # 48, Ex. 5 at Ex. CC). According to Mr. Slusher's letter, Mr. Post told him,

> I did the job alone I rang the buzzer and told the old lady I had to walk home so could I please come in and get warm. Well I knew there would be no problem getting in because she seen me earlier that night and thought I was okay. Well I bullshited with her for about 10 minutes and she told me she was glad I was there because she was afraid of being robbed . . . I remember exactly what I said, I said HA HA and shot her once then twice in the head. I then made sure the purse and all the money was in the canvas bag and went back to the car.

(Docket # 48, Ex. 5 at Ex. CC). Mr. Slusher also claimed that Mr. Post offered him $5,000 or $3,000 and a motorcycle to kill Ralph Hall because Mr. Post believed that, without Ralph Hall, the police could not prove that he was at "the scene of the crime." (Docket # 48, Ex. 5 at Ex. CC). Mr. Slusher concluded the letter by mentioning the location of the gun and that the purse was burnt with gasoline in a 55-gallon drum.

c. State's Motion to Dismiss

In response to the filing of Mr. Post's petition for state postconviction relief and accompanying exhibits, on 4 November 1988, the State filed a motion to dismiss the petition, arguing that each of Mr. Post's claims was raised or should have been raised on direct appeal. (Docket # 25, Ex. CC).

Mr. Post filed a memorandum in opposition to the State's motion to dismiss on 5 January 1989. (Docket # 48, Ex. 2). He attached four exhibits to his memorandum.

Exhibit 1 was an affidavit from Michael Tully, one of Mr. Slusher's attorneys. According to Mr. Tully, "it was determined by the Lorain County Prosecutor's Office that Richard Slusher would intentionally elicit statements from Ronald Post concerning his Aggravated Murder case" in exchange for sentencing consideration. (Docket # 48, Ex. 2 at Ex. 1). Mr. Tully stated "[t]hat Slusher's role as an informant and his working relationship with the Lorain County Prosecutor's Office (his efforts to solicit informant [sic] from Post) was never placed upon the record." (Docket # 48, Ex. 2 at Ex. 1). Mr. Tully further asserted that robbery charges against Mr. Slusher were dismissed as a result of Mr. Slusher's cooperation.

Exhibit 2 was a letter dated 5 December 1983 from the Lorain County Prosecutor's Office to another of Mr. Slusher's lawyers. In the letter, a prosecutor made the following statement: "The more Mr. Slusher does for us the more we will do for him." (Docket # 48, Ex. 2 at Ex. 2).

Exhibit 3 was a letter dated 13 August 1985 from Gregory White, Lorain County's prosecuting attorney, to Judge Betleski. The letter reminded Judge Betleski that Mr. Slusher "was of a help to the State of Ohio in the Case of the State of Ohio -v-

Ronald Post" and declares that the prosecutor's office thus has no objection to Mr. Slusher receiving shock probation. (Docket # 48, Ex. 2 at Ex. 3).

Exhibit 4 is a letter dated 15 January 1985 from Mr. White to Mr. Duff. It states that Richard Slusher was sentenced to three to fifteen years in one case, which would run concurrently with his sentence in a prior case. The letter also states that the charges in two other cases against Mr. Slusher were dismissed.

The State filed a supplemental response on 7 March 1989 (Docket # 25, Ex. EE). Mr. Post filed another brief on 31 March 1989, to which he attached additional exhibits. (Docket # 50, Ex. 117). Exhibit 7 is a 22 September 1984 statement from a Dino Cerrone, who stated, "as long as I have known Slusher he has always made things up to make himself look good and burning others . . . just telling lies to save his ass." (Docket # 50, Ex. 117 at Ex. 7). Exhibit 8 was a transcript of an interview of Mr. Cerrone by Ohio Public Defender Commission investigators. During the interview, Mr. Cerrone stated that Mr. Post never confessed to him.

Exhibit 9 was a 22 September 1984 statement from Franklin Roak, one of Mr. Post's fellow inmates at Lorain County Jail. According to Mr. Roak, Mr. Post always maintained his innocence, but told Mr. Slusher "a bunch of shit to mislead him" because he thought he was an informant. (Docket # 50, Ex. 117 at Ex. 9). Exhibit 10 was an affidavit of Mr. Roak, in which he claims that Mr. Post never confessed to killing Helen Vantz to him. (Docket # 50, Ex. 117 at Ex. 10; Docket # 48, Ex. 4 at A136).

d. Limited Evidentiary Hearing

Attorneys David Doughten and William Lazarow joined Mr. Post's legal team on 30 August 1989 and 8 September 1989, respectively. (Docket # 50, Ex. 121, 124). On 8 September 1989, Judge Edward Zaleski limited the evidentiary hearing on Mr. Post's petition "to the issue of ineffective assistance of counsel in relation to the plea agreement and alleged possible sentence promised." (Docket # 25, Ex. FF). Three days later, Mr. Post requested the Lorain County Prosecuting Attorney to produce, among other items, all documents relating to Richard Slusher's role as an informant for any prosecutor's office or any law enforcement agency. (Docket # 50, Ex. 128).

A limited evidentiary hearing on Mr. Post's petition for state postconviction relief was held on 3 October 1989. Mr. Post's first witness was Mr. Hume, his original trial attorney. Mr. Hume testified, "The offer that I thought I had from the State was for life imprisonment, parole eligibility after 30 years." (Docket # 23, Ex. 4 at 7). Mr. Hume stated that Mr. Post rejected the offer and that he then withdrew as Mr. Post's counsel. (Docket # 23, Ex. 4 at 7).

Mr. Post testified next. He stated that he rejected the plea bargain because he wanted a jury trial. (Docket # 23, Ex. 4 at 10). Mr. Post further testified that Ms. McGough, who replaced Mr. Hume, wanted him to plead guilty, while Mr. Duff wanted him to enter a plea of no contest. (Docket # 23, Ex. 4 at 11). Mr. Post claimed that he thought the purpose of the no contest plea was to appeal and to receive a new trial. (Docket # 23, Ex. 4 at 12). According to Mr. Post, Ms. McGough agreed that he should enter a no contest plea. (Docket # 23, Ex. 4 at 12). He testified, "I was under the impression that she had secured some kind of deal, in some way that when she talked to Adrian Betleski that I would not receive the death penalty if I plead no contest . . .

[p]rimarily, I think because of religious purposes." (Docket # 23, Ex. 4 at 12). Mr. Post also stated that Ms. McGough reviewed the nine-page petition to change his plea with him, but he did not read it himself. (Docket # 23, Ex. 4 at 13). Mr. Post claimed that Ms. McGough promised him that he would not receive the death penalty if he pled no contest, and that he told Judge Betleski that he did not receive any promises because that is what his attorney told him to say. (Docket # 23, Ex. 4 at 13-14). He stated that he would have "gone to trial" if he thought he would receive the death penalty after a plea of no contest or of guilty. (Docket # 23, Ex. 4 at 15).

Assistant Prosecuting Attorney Jonathon Rosenbaum then cross-examined Mr. Post. Mr. Post testified, "I never gave no confession to anybody." (Docket # 23, Ex. 4 at 16). According to Mr. Post, he told the Judge that he did not receive any promises because his attorneys told him what to say. (Docket # 23, Ex. 4 at 20). He testified, "I was told not to say anything in Court. It was policy to tender some kind of deal, but not admit it into open Court." (Docket # 23, Ex. 4 at 21). He claims to have lied to the panel because he "was told to listen to my attorneys and nobody else." (Docket # 23, Ex. 4 at 21). Mr. Post stated, "I was assured I wouldn't get the death penalty." (Docket # 23, Ex. 4 at 22).

Mr. Duff then took the stand. He testified that the prosecution had offered a sentence of thirty years to life imprisonment if Mr. Post would plead guilty, but Mr. Post would not accept the deal. (Docket # 23, Ex. 4 at 25). According to Mr. Duff, the plea bargain would not apply to a no contest plea. (Docket # 23, Ex. 4 at 26). He stated that the goal of defense counsel was to save Mr. Post's life, and that Ms. McGough preferred a guilty plea to a no contest plea. (Docket # 23, Ex. 4 at 26). Mr. Duff further testified

that he thought that a no contest plea would not result in a death sentence because Judge Betleski told Ms. McGough that he was Catholic, the Pope opposed the death penalty, and a no contest plea would be a mitigating factor. (Docket # 23, Ex. 4 at 27-28). Mr. Duff claimed that this information was communicated to Mr. Post. (Docket # 23, Ex. 4 at 27-28). According to Mr. Duff, the main reason he advised Mr. Post to plead no contest was that he was unwilling to plead guilty. (Docket # 23, Ex. 4 at 29).

During cross-examination, Mr. Duff testified that he and Ms. McGough never guaranteed Mr. Post that he would not receive the death penalty if he pled no contest. (Docket # 23, Ex. 4 at 30, 33). He stated that Ms. McGough informed Mr. Post that a death sentence remained a distinct possibility. (Docket # 23, Ex. 4 at 30, 33). Mr. Duff opined that the case was "a dead bang loser" and "relatively hopeless or bleak" because Mr. Post "[c]onfessed to a lot of people." (Docket # 23, Ex. 4 at 31-32). He testified that Mr. Post would not admit his guilt to him. (Docket # 23, Ex. 4 at 31). According to Mr. Duff, both defense attorneys advised Mr. Post to plead guilty, but he refused. (Docket # 23, Ex. 4 at 31-32). He testified that defense counsel hoped that Judge Betleski would consider a no contest plea in mitigation. (Docket # 23, Ex. 4 at 32). Finally, Mr. Duff stated that he and Mr. Post were aware of an audio tape of Mr. Post negotiating with someone over the phone to kill a witness. (Docket # 23, Ex. 4 at 34).

Ms. McGough was Mr. Post's next witness. She testified that "any plea negotiations were premised on Ron's pleading guilty." (Docket # 23, Ex. 4 at 41). She stated that she recommended that Mr. Post plead guilty so that she could "work out a concrete plea bargain," but he refused. (Docket # 23, Ex. 4 at 42). According to

Ms. McGough, one of the prosecutors "made it absolutely crystal clear if the no contest plea were entered that he was going to seek the death penalty." (Docket # 23, Ex. 4 at 43). She further testified that she canvassed the three judges to find out if they would refuse to impose the death penalty on moral grounds and if they would consider a no contest plea to be a mitigating factor. (Docket # 23, Ex. 4 at 44). Judges Harris and Cirigliano allegedly told her that they would be able to impose the death penalty and that a no contest plea would not qualify as a mitigating factor. (Docket # 23, Ex. 4 at 45). Ms. McGough testified that Judge Betleski told her that he would have a moral struggle and "that the Man in Rome says capital punishment . . . is wrong, and I've been following that man's advice for a number of years, and I don't know that I'll change now." (Docket # 23, Ex. 4 at 45). However, Judge Betleski allegedly said, "I'm a Judge in the State of Ohio. I have an oath of office. I'm going to follow my oath." (Docket # 23, Ex. 4 at 46). Based on this conversation, Ms. McGough testified that her feeling at the time was that Judge Betleski would impose the death penalty. (Docket # 23, Ex. 4 at 46). Ms. McGough claimed to have relayed this belief and the substance of the conversation to Mr. Duff and Mr. Post. (Docket # 23, Ex. 4 at 46-47). She testified that she communicated to Mr. Post as strongly as she could her feeling that all three judges were willing to impose the death penalty. (Docket # 23, Ex. 4 at 47).

Ms. McGough further testified that she recommended to Mr. Post that he plead guilty and never advised him to enter a no contest plea. (Docket # 23, Ex. 4 at 48, 51, 52, 53). She stated that she and Mr. Duff had different views on the appropriate plea because Mr. Duff felt very strongly that the admissibility of Mr. Holmok's testimony was a strong appellate issue. (Docket # 23, Ex. 4 at 49-50). Ms. McGough testified that she

never told anybody that she was comfortable with the no contest plea or that she felt that Mr. Post would not receive the death penalty. (Docket # 23, Ex. 4 at 56-58).

On cross-examination, Ms. McGough emphasized that she advised Mr. Post that he could receive the death penalty if he pled no contest and that she did not tell him that Judge Betleski would refrain from imposing the death penalty. (Docket # 23, Ex. 4 at 58). She testified that she told Mr. Post that the prosecution would seek the death penalty on a no contest plea and that Judge Betleski would be willing to impose the death penalty on such a plea. (Docket # 23, Ex. 4 at 58-60). She stated, "I believe we gave Mr. Post all of his options. We explained the penalties, we explained our view of the pros and cons of both pleas, and, as in all cases, ultimately the client has to choose." (Docket # 23, Ex. 4 at 59, 65).

Ms. McGough characterized the State's case as "very, very strong" because Mr. Post confessed to several individuals. (Docket # 23, Ex. 4 at 60-61). She testified that, at the time, she felt that the State would prevail at a trial. (Docket # 23, Ex. 4 at 61). Ms. McGough claimed that she never told Mr. Post to disregard what the judges said or that death was not a possible sentence. (Docket # 23, Ex. 4 at 62). Ms. McGough stated, "I believed that if he entered a no contest plea he would receive the death penalty." (Docket # 23, Ex. 4 at 66).

Patricia Post, Mr. Post's sister-in-law, was the next witness. She testified that she attended a meeting before the change of plea hearing, at which Ms. McGough told Mr. Post that "if he would enter the plea of guilty he would not get the death sentence." (Docket # 23, Ex. 4 at 68). According to her, Mr. Duff wanted Mr. Post to plead no contest in order to pursue an appeal and that "he did not believe that Ron would get the

death penalty by pleading no contest." (Docket # 23, Ex. 4 at 69). She testified that Mr. Post was confused about what plea he should enter "right up until the last minute." (Docket # 23, Ex. 4 at 69).

Gary Post, Mr. Post's brother, then testified that he had a meeting with Ms. McGough the day after the plea hearing. According to Gary Post, Ms. McGough expressed her opinion that Mr. Post would not receive the death penalty because of Judge Betleski's religious views. (Docket # 23, Ex. 4 at 75-76). On cross-examination, Gary Post clarified that she said Mr. Post would receive a sentence of thirty years to life imprisonment on a guilty plea, not on a plea of no contest. (Docket # 23, Ex. 4 at 76-77).

Benjamin Wills, one of Mr. Post's appellate attorneys, testified that he had a meeting with Ms. McGough after he was assigned to the case. (Docket # 23, Ex. 4 at 78-79). According to Mr. Wills, Ms. McGough said that she had not believed that Mr. Post would receive the death penalty on a no contest plea because of Judge Betleski's religious convictions. (Docket # 23, Ex. 4 at 79). Mr. Wills thought that Ms. McGough felt betrayed or misled by the Judge after the sentencing. (Docket # 23, Ex. 4 at 80).

Mr. Post then called Sam Weiner, an attorney with expertise in death penalty litigation. (Docket # 23, Ex. 4 at 82-86). Mr. Weiner criticized Mr. Duff and Ms. McGough for failing to obtain a plea agreement, failing to include a clause in the change of plea petition that would have permitted Mr. Post to withdraw his no contest plea if he was going to be sentenced to death, and failing to preserve the Holmok appellate issue through the drafting of the statement of facts. (Docket # 23, Ex. 4 at 89-

91). In his opinion, the no contest plea conferred no benefit on Mr. Post. (Docket # 23, Ex. 4 at 90-91, 93). He concluded that defense counsel provided ineffective assistance. (Docket # 23, Ex. 4 at 95).

The State's only witness was Lorain County Prosecuting Attorney Gregory White. He testified that no offer of thirty years to life imprisonment in exchange for a guilty plea was made. (Docket # 23, Ex. 4 at 106).

e. Decision Denying Postconviction Relief

After post-hearing briefing (Docket # 25, Ex. GG, HH), Judge Edward Zaleski of the Lorain County Court of Common Pleas issued his Conclusions of Law and Findings of Fact on 22 December 1989. (Docket # 49, Ex. 15; Docket # 25, Ex. II). Judge Zaleski found that Mr. Post's plea of no contest was knowing, intelligent, and voluntary. (Docket # 49, Ex. 15 at 4). He also found that the representation of Mr. Duff and Ms. McGough was not ineffective. (Docket # 49, Ex. 15 at 5-6). Judge Zaleski, therefore, denied Mr. Post's petition for postconviction relief.

2. Ninth District Court of Appeals

On 18 January 1990, Mr. Post filed his notice of appeal to the Ohio Court of Appeals. (Docket # 50, Ex. 134). On 8 March 1990, Mr. Post moved to remand the case back to the Court of Common Pleas for findings of fact and conclusions of law on the issues presented by his petition that were not addressed in the limited evidentiary hearing. (Docket # 51, Ex. 172). This motion was denied on 29 March 1990. (Docket #

26, Ex. JJ at 4). In his merit brief of 11 April 1990, Mr. Post presented the following assignments of error:

> ASSIGNMENT OF ERROR NO. I
>
> The trial court erred in denying appellant Post a full hearing on all the issues presented; in failing to file findings of facts and conclusions of law on all issues and in considering improper evidence in reaching his decision.
>
> ASSIGNMENT OF ERROR NO. II
>
> The trial court erroneously determined that appellant entered a voluntary, intelligent no contest plea in his capital case when the plea was based on ineffective assistance of counsel.
>
> ASSIGNMENT OF ERROR NO. III
>
> The trial court erred in failing to grant a hearing when a petitioner presents sufficient allegations that his cellmate was acting in concert with the state when he obtained incriminating statements from petitioner and the state failed to provide this evidence to the defense.
>
> ASSIGNMENT OF ERROR NO. IV
>
> Appellant Post was denied the effective assistance of counsel during the guilt/innocence stage of his capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16, Article I of the Ohio Constitution.
>
> ASSIGNMENT OF ERROR NO. V
>
> Appellant Post was denied the effective assistance of counsel at the penalty phase of his capital trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.
>
> ASSIGNMENT OF ERROR NO. VI
>
> The trial court erred in failing to grant an evidentiary hearing on the incompetent and inappropriate psychiatric evaluation performed on appellant.

ASSIGNMENT OF ERROR NO. VII

> The trial court erred in failing to grant an evidentiary hearing on the breach of the attorney-client privilege by a member of the defense team in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16, Article I of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. VIII

> It is error to admit victim impact evidence into the sentencing determination of a capital case.

(Docket # 26, Ex. JJ). On 8 August 1990, the Ninth District Court of Appeals remanded the case to the Court of Common Pleas for consideration of the causes of action other than ineffective assistance of counsel in relation to the plea agreement and alleged sentence promised. (Docket # 26, Ex. MM; Docket # 49, Ex. 106).

3. Court of Common Pleas on Remand

On 4 March 1996, Judge Zaleski issued Findings of Fact and Conclusions of Law for all nine causes of action in Mr. Post's petition for postconviction relief. (Docket # 26, Ex. NN; Docket # 49, Ex. 16). The court denied the petition in its entirety.

4. Ninth District Court of Appeals After Remand

On 1 April 1996, Mr. Post filed a notice of appeal of Judge Zaleski's second denial of his petition for postconviction relief. (Docket # 49, Ex. 26). Mr. Post asserted the following assignments of error:

ASSIGNMENT OF ERROR NO. I

> The trial court erroneously determined that appellant entered a voluntary, intelligent no contest plea in his capital case when the plea was based on ineffective assistance of counsel.

ASSIGNMENT OF ERROR NO. II

> The procedural errors committed by the trial court denied petitioner a fair adjudication of his post-conviction petition.

ASSIGNMENT OF ERROR NO. III

> Appellant Post was denied the effective assistance of counsel during the guilt/innocence stage of his capital trial.

ASSIGNMENT OF ERROR NO. IV

> The trial court erred in denying appellant's third and fourth claims for relief.

ASSIGNMENT OF ERROR NO. V

> Appellant Post was denied the effective assistance of counsel at the penalty phase of his capital trial.

ASSIGNMENT OF ERROR NO. VI

> Appellant Post was denied his right to assistance of experts as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, Section 10, Article I of the Ohio Constitution, and R.C. 2929.024.

ASSIGNMENT OF ERROR NO. VII

> The State of Ohio's [sic] failed to disclose evidence.

(Docket # 26, Ex. OO).

On 3 January 1997, the Court of Appeals rejected these assignments of error and affirmed the Court of Common Pleas' dismissal of Mr. Post's petition. (Docket # 27, Ex. RR).

Mr. Post filed an application for reconsideration on 13 January 1997. (Docket # 27, Ex. SS). The application was denied by the Court of Appeals on 5 February 1997. (Docket # 27, Ex. TT).

5. Supreme Court of Ohio

Mr. Post filed his notice of appeal to the Supreme Court of Ohio on 14 February 1997. (Docket # 51, Ex. 187). In his memorandum in support of jurisdiction, he raised the following propositions of law:

PROPOSITION OF LAW NO. I

> When a capital defendant receives erroneous and/or conflicting advice from his attorneys, which he relies upon to enter a no-contest plea, the plea entered is not a knowing, intelligent, and voluntary plea.

PROPOSITION OF LAW NO. II

> A fair adjudication of a capital defendant's post-conviction petition requires a trial court to grant an evidentiary hearing where the petition is facially sufficient to raise an issue that the petitioner's conviction is void or voidable, and also permits a petitioner to avoid the doctrine of res judicata where the petition is supported by evidence dehors the record.

PROPOSITION OF LAW NO. III

> When evidence dehors the record is presented in a state post-conviction proceeding which indicates that a capital defendant received the ineffective assistance of counsel in the trial phase of his case, the trial court must either grant an evidentiary hearing or a new trial.

PROPOSITION OF LAW NO. IV

> A breach of the attorney client privilege and the right to counsel exists when defense counsel and/or agents of defense counsel disseminate the existence of confidential statements made by the

defendant to the state. This confidential relationship is further exploited by the state's use of a jailhouse informant to elicit exculpatory statements from the defendant.

PROPOSITION OF LAW NO. V

When evidence dehors the record is presented in a state post-conviction proceeding which indicates that a capital defendant received ineffective assistance of counsel in the penalty phase of his case, the trial court must either grant an evidentiary hearing or a new trial.

PROPOSITION OF LAW NO. VI

When the court-appointed psychologist fails to conduct a proper mental evaluation in the penalty phase of a capital case, a capital defendant is denied competent and appropriate expert assistance.

PROPOSITION OF LAW NO. VII

When the State of Ohio fails to disclose impeachment evidence to a capital defendant, that defendant's rights as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, Section 10, Article I of the Ohio Constitution, and Brady v. Maryland, 373 U.S. 83 (1963) are violated.

(Docket # 27, Ex. UU).

On 14 May 1997, the Supreme Court of Ohio declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. (Docket # 27, Ex. WW). The court set an execution date of 2 December 1997. (Docket # 51, Ex. 223).

G. Federal Petition for Writ of Habeas Corpus

On 20 November 1997, Mr. Post filed his petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254. (Docket # 16). He presents the following Grounds for Relief:

FIRST GROUND FOR RELIEF

Mr. Post was denied his constitutional right to the effective assistance of counsel throughout the guilt/innocence phase of the trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

SECOND GROUND FOR RELIEF

Mr. Post's plea to the charges was involuntary due to the ineffective assistance of counsel that he received, in violation of his rights to the effective assistance of counsel, due process and a fair trial as guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

THIRD GROUND OF RELIEF

Mr. Post's plea to the charges was involuntary because there was not a valid jury waiver in violation of due process and a fair trial as guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

FOURTH GROUND FOR RELIEF

Mr. Post's rights to the effective assistance of counsel, due process and a fair trial were violated by privileged communications being made known to the prosecution in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

FIFTH GROUND FOR RELIEF

Mr. Post's rights to a fair trial and the effective assistance of counsel were violated as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by the State's use of an informant while Mr. Post was in custody.

SIXTH GROUND FOR RELIEF

Mr. Post was deprived of his rights to a fair trial, effective assistance of counsel and freedom from cruel and unusual punishment due to prosecutorial misconduct whereby favorable evidence was not disclosed to Mr. Post in violation of the Fifth, Sixth, Eighth, and Fourteen Amendments to the United States Constitution.

SEVENTH GROUND FOR RELIEF

Mr. Post was denied the effective assistance of counsel during the mitigation phase of his trial in deprivation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights of the United States Constitution.

EIGHTH GROUND FOR RELIEF

Mr. Post was denied his right to expert assistance as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

NINTH GROUND FOR RELIEF

Mr. Post's rights to a reliable sentencing determination and freedom from cruel and unusual punishment were violated by the use of victim impact material and the pre-sentence investigation report in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

TENTH GROUND FOR RELIEF

Mr. Post was deprived of his right to a reliable sentencing determination whereby the court failed to find that any mitigating factors existed, in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

ELEVENTH GROUND FOR RELIEF

The court erred by failing to follow the procedure proscribed in Ohio Criminal Rule 11(C)(3) and (C)(4) requiring a trial de novo to determine the existence of a specified aggravating factor, in violation of Mr. Post's right to a reliable sentencing determination in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

TWELFTH GROUND FOR RELIEF

Ohio's statutory provisions governing its capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These provisions are unconstitutional on their face and as applied to Mr. Post.

THIRTEENTH GROUND FOR RELIEF

> Mr. Post's death sentence is inappropriate because he was denied the procedural safeguard of a meaningful proportionality review by the court of appeals and the Ohio Supreme Court because neither court conducted any meaningful review or had a body of cases from which to conduct a meaningful proportionality review in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(Docket # 16).

On 21 November 1997, this Court stayed Mr. Post's execution pending resolution of his petition. (Docket # 19). Respondent filed a return on writ on 21 January 1998. (Docket # 22). On 12 May 1998, the Court denied a motion by Mr. Post for the Court to find that the Antiterrorism and Effective Death Penalty Act does not apply to Mr. Post's petition. (Docket # 45). On that day, the Court also denied respondent's motion to dismiss the petition on statute of limitations grounds. (Docket # 46).

On 2 April 1998, this Court granted Mr. Post's motion for an order requiring the state to correct and expand the record, (Docket # 42), and the state filed supplemental exhibits on 1 June 1998.

On 8 October 1998, the Court denied Mr. Post's first motion for leave to conduct discovery. (Docket # 61). However, on 28 January 1999, the Court permitted petitioner's counsel to investigate and have discovery regarding Richard Slusher, Mr. Post's former pod-mate, and Robert Holmok, the polygraph examiner who met with Mr. Post at the defense's request. (Docket # 72).

On 7 June 1999, Mr. Post filed his traverse. (Docket # 84). He also filed a motion for an evidentiary hearing and a motion to expand the record. (Docket # 82, 83). Oppositions and a reply to the motions have been filed. (Docket # 85, 86, 89).

II. LAW AND ANALYSIS

A. The Applicability of AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended 28 U.S.C. § 2254, was signed into law on 24 April 1996. In Lindh v. Murphy, 521 U.S. 320, 322-322, 336 (1997), the Supreme Court of the United States held that the provisions of AEDPA apply to habeas corpus petitions filed after that effective date. See also, Barker v. Yukins, 199 F.3d 867, 871 (6th Cir. 1999) ("It is now well settled that AEDPA applies to all habeas petitions filed on or after its April 24, 1996 effective date."). As Mr. Post's petition was filed on 20 November 1997, ADEPA governs this Court's consideration of his petition.

B. AEDPA's Standards

"The AEDPA limits the ability of federal courts to grant writs of habeas corpus where a state court has considered the federal claim on its merits." Zobel v. Tate, 36 Fed.Appx. 772, *4 (6th Cir. 2002). The statute provides, in part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is "contrary to" federal law only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a

question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the particular state prisoner's case." Id. at 413. Federal courts "may only look to decisions of the Supreme Court of the United States when determining 'clearly established federal law.'" Barnes v. Elo, 231 F.3d 1025, 1028 (6th Cir. 2000).

A federal court "may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

C. Statute of Limitations

Section 2244(d)(1) establishes a limitations period for the filing of federal habeas corpus petitions. The section provides, in pertinent part,

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

28 U.S.C. § 2244(d)(1).

As this Court explained in its 12 May 1998 Order Denying Dismissal on the Basis of the Statute of Limitations (Docket # 46), this provision does not bar Mr. Post's petition. The Sixth Circuit consistently has held that, "for those whose state appeals concluded

prior to the passage of AEDPA . . . a one-year grace period applies, and . . . the statute of limitations expires one year from the passage of AEDPA, on April 24, 1997." Austin v. Mitchell, 200 F.3d 391, 393 (6th Cir. 1999). In addition, under § 2244(d)(2), the time during which a properly filed state postconviction petition is pending does not count toward the period of limitations. Nowak v. Yukins, 46 Fed.Appx. 257, 259 (6th Cir. 2002).

In this case, Mr. Post's petition for state postconviction relief was pending until 14 May 1997, when the Supreme Court of Ohio declined to hear the case. As the limitations period was tolled from the effective date of AEDPA until 14 May 1997, the one-year grace period did not expire until 14 May 1998. Mr. Post's petition was filed on 20 November 1997, well within the limitations period.

D. Deference to State Court Factual Findings Under AEDPA

Section 2254(e)(1) provides,

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Mr. Post contends that, contrary to this provision, none of the factual findings made by the Ohio courts are entitled to a presumption of correctness. (Docket # 16 at 13). He cites exceptions to the presumption of correctness that existed in the pre-AEDPA version of § 2254. (Docket # 16 at 13-14). Because the current version of the section does not include the exceptions referenced by Mr. Post, this Court rejects Mr. Post's all-inclusive, blanket assertion that the presumption of correctness does not

apply here. The Court will assess any specific challenges to the presumption of the correctness of a specific state court factual finding if they are relevant to the analysis.

In his traverse, Mr. Post raises a separate argument. He contends that, on 28 September 1993, a Judge Mahon denied the fifty-five claims of his petition for state postconviction relief by rubber-stamping proposed findings of fact and conclusions of law that were submitted to the judge by the prosecution ex parte. (Docket # 84 at 45). In actuality, Judge Zaleski issued his opinion denying Mr. Post's petition for post-conviction relief, which raised nine causes of action, on 4 March 1996. There is no indication that Judge Zaleski did not write the opinion himself. Given the bizarre nature of this argument and its apparent lack of any relationship to the facts of this case, the Court can only conclude that counsel for the petitioner were referring to the circumstances of another case. In any event, the argument does not alter the applicability of § 2254(e)(1) to this case.

E. Exhaustion of State Remedies

A state prisoner must exhaust all possible state remedies or have no remaining state remedies before a federal court will review a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b) and (c). In order to properly exhaust state remedies, a petitioner must fairly present the substance of his federal constitutional claims to the state courts. Picard v. Conner, 404 U.S. 270, 275-276 (1971). "The state courts must be provided with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon the petitioner's constitutional claim." Sampson v. Love, 782 F.2d 53 (6th Cir. 1986).

"A petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." Hannah v. Conley, 49 F.3d 1193, 1196 (6th Cir. 1995). "The factual and theoretical substance of a claim must be presented to state courts to render it exhausted for federal habeas corpus purposes." Id. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

If a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has waived, or procedurally defaulted, those claims. Id. at 848; Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994). A federal court then must determine whether cause and prejudice exist to excuse the failure to present the claim to the state courts. Rust, 17 F.3d at 160.

In this case, Mr. Post completed two full rounds of state review. He has no remaining state court remedies. Respondent "concedes that Post has satisfied the exhaustion requirement" because he "resorted to all levels of state appellate review and to all avenues for state postconviction relief." (Docket # 22 at 21-22). The Court concludes that Mr. Post has exhausted his state court remedies.

However, Respondent contends that Mr. Post failed to fairly present certain claims to the Ohio courts. This contention will be examined as a procedural default issue below.

F. Petitioner Post's Motion to Expand the Record

1. The Request

In his motion to expand the record, Mr. Post seeks to present three additional affidavits for the first time. (Docket # 83).

The first affidavit, sworn to on 7 June 1999, is from former-judge Adrian Betleski. He states, "I do not recall ever having a conversation with Ms. McGough to discuss sentencing options regarding Mr. Post on either a plea of guilty or no contest." (Docket # 83 at Ex. 1 at ¶ 5). He also states, "I do not recall ever making the statement to Ms. McGough in reference to a potential case for Mr. Post that 'I follow the teachings of the Pope.'" (Docket # 83 at Ex. 1 at ¶ 6). Moreover, Judge Betleski claims that Mr. Vantz's victim impact statement at sentencing "served as an important factor in my deliberative process and had a great impact on my opinion that death was the appropriate remedy in this case." (Docket # 83 at Ex. 1 at ¶ 8).

The second affidavit, sworn to on 26 May 1999, is from former-judge Joseph Cirigliano. He asserts, "I do not recall meeting with Ms. McGough to discuss the mitigating weight to be given to the fact that Mr. Post would plead no contest to the indictment." (Docket # 83 at Ex. 2 at ¶ 5). Further, Judge Cirigliano states, "That as part of the deliberative process, I considered the victim impact statement delivered by Mr. Vantz" at sentencing and that "part of the victim impact statement probably had a great impact on my thinking when arriving at death as the appropriate penalty." (Docket # 83 at Ex. 2 at ¶¶ 8, 9).

The final affidavit, sworn to on 2 June 1999, is from Michael Duff, Mr. Post's former attorney. He states that, at the time of the no contest plea, he (and as far as he

is aware, Ms. McGough) did not waive Mr. Post's right to a trial de novo to determine the existence of an aggravating factor. (Docket # 83 at Ex. 3 at ¶ 5). Mr. Duff further states, "I believed when the prosecutor stated that he would read a statement of the facts, 'as required by law,' that he had researched the issue [and] was correct that a statement of facts would satisfy the requirements of the law." (Docket # 83 at Ex. 3 at ¶ 6). He claims, "neither Ms. McGough nor I entered into an agreement with the prosecutors that a statement of the facts could be used in lieu of the requirement that the three judge panel examine witnesses and hear any other evidence properly presented by the prosecutor in order to make a determination as to the guilt of the defendant." (Docket # 83 at Ex. 3 at ¶ 7). Finally, Mr. Duff states,

> as defense counsel, I objected to and I did not stipulate to the statement of the facts as presented by the prosecution or to the procedure utilized by the prosecution. I did not participate in the drafting of the statement of the facts as read by the prosecutor and I did not agree to the prosecutor's procedure.

(Docket # 83 at Ex. 3 at ¶ 8).

2. Standard for Expansion of the Record

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts provides for the expansion of the record in habeas cases. Rule 7(a) states, "If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition." Rule 7(b) provides, "The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents,

exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as part of the record."

For analytical purposes, the Court will consider three portions of the affidavits separately: (1) the judges' statements regarding the victim impact statement; (2) the judges' statements regarding conversations with Ms. McGough; and (3) Mr. Duff's statements.

3. Judges' Statements Regarding Victim Impact Statement

The record will not be expanded to include the judges' statements regarding the victim impact statements for two reasons. First, this Court cannot consider the testimony of judges regarding their mental processes. Second, the statements would place Mr. Post's Ninth Ground for Relief in such a significantly different evidentiary posture that it could no longer be said that he had fairly presented the claim to state courts.

a. Inadmissibility

It is well established that courts are not permitted to consider the testimony of judges regarding their mental processes. In 1904, the U.S. Supreme Court held that "the testimony of the trial judge, given six years after the case had been disposed of, in respect to the matters he considered and passed upon, was obviously incompetent." Fayerweather v. Reynolds, 195 U.S. 276, 306-307 (1904). The Court reasoned, "A judgment is a solemn record. Parties have a right to rely upon it. It should not be lightly disturbed, and ought never to be overthrown or limited by the oral testimony of a judge

or juror of what he had in mind at the time of the decision." Id. at 307. In 1941, the Supreme Court cited Fayerweather for the proposition that a judge's mental processes cannot be scrutinized. United States v. Morgan, 313 U.S. 409, 422 (1941).

The vitality of this rule is unquestioned. In United States v. Crouch, the Fifth Circuit declared,

> this court will not review the mental processes of the trial judge. A judge's statement of his mental processes is absolutely unreviewable . . . [and] is so impervious to attack that even if he were to come forward today and declare that his memorandum misstated his reasons for the mistrial, we could not consider his explanation.

566 F.2d 1311, 1316 (5th Cir. 1978). In Washington v. Strickland, a death penalty case on habeas review, the Fifth Circuit, sitting en banc, held that, although the district court could consider the trial judge's testimony to the extent that it contained personal knowledge of historical facts or an expert opinion, "the portion of [the judge's habeas hearing] testimony in which he explained his reasons for imposing the death sentence and his probable response to the evidence adduced at the habeas hearing is inadmissible evidence that may not be considered by the district court." 693 F.2d 1243, 1263 (5th Cir. 1982). The Court of Appeals explained,

> There are several strong policy reasons that counsel continued adherence to this rule. First, such testimony poses special risks of inaccuracy. The testimony is often given several years after the fact and a judge is unlikely to be able to reconstruct his thought processes accurately over such a span of time. Second, the finality and integrity of judgments would be threatened by a rule that enabled parties to attack a judgment by probing the mental processes of a judge . . . Finally, a rule that allows the probing of the mental processes of a state judge would exacerbate certain problems that are already inherent in the habeas corpus context. The tendency of the habeas proceeding to detract from "the perception of the trial of a criminal case in state court as a decisive and portentous event" is enhanced by the prospect that the state trial judge may be called into federal court several years later to recreate his thought processes at the criminal trial. Additionally, the friction between the state and federal

> systems of justice can hardly be alleviated by a rule that permits the parties to interrogate a state judge in federal court regarding the basis for his decision.

Id. (internal citations omitted).

Similarly, the Eleventh Circuit stated, in Proffitt v. Wainwright, another death penalty case,

> the district court should not have considered the trial judge's post-decision statements concerning the influence various facts had on his decision. The judge's testimony was not limited to matters of basic, historical fact but directly addressed the effect of the psychiatric evidence on his sentencing decision. Such post-decision statements by a judge or juror about his mental processes in reaching [a] decision may not be used as evidence in a subsequent challenge to the decision.

685 F.2d 1227 (11th Cir. 1982).

In Morrison v. Kimmelman, the State sought to present to the federal habeas court the deposition or testimony of a state trial judge regarding whether his verdict would have been different had certain evidence not been admitted in trial. 650 F.Supp. 801 (D.N.J. 1986). The district court noted, "it is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision." Id. at 805. The court stated that "the fact that the state trial judge might be willing to testify is irrelevant to this consideration." Id. at 807. The district court continued, "If a judge seeks to give reasons for a decision, we are wiser for what is said on the record. However, once a judicial opinion is written and filed, we are all as expert in its interpretation as the hand that wrote it. It belongs to us all." Id.

More recently, the Fifth and Ninth Circuits have reaffirmed this rule. See Robinson v. Commissioner of Internal Revenue, 70 F.3d 34, 38 (5th Cir. 1995); Ceja v. Stewart, 97 F.3d 1246, 1256 (9th Cir. 1996).

The rule governs the district courts within the Sixth Circuit, as well. In Perkins v. LeCureux, the sentencing judge testified, at a habeas evidentiary hearing, that the petitioner's sentence of 50 to 100 years imprisonment was determined in part by the judge's desire "to send a message back to the black community to stop this kind of senseless killing." 58 F.3d 214, 217 (6th Cir. 1995). Noting that "[t]he District's Court's decision to disturb this 20-year-old conviction is based entirely on a statement made by the sentencing judge ten years after the fact, regarding his thought processes at the time of sentencing," the Sixth Circuit held that "[t]his type of evidence must not be considered." Id. at 220. Adhering to this precedent, in Wickline v. Anderson, Judge Graham of the Southern District of Ohio held that the surviving judge of a three-judge panel could not be deposed in a habeas proceeding "to determine whether the judges' knowledge of inadmissible evidence had any impact on their deliberations." Case No. C2-96-291 (15 July 1997).

For nearly a century, every federal court that has considered the issue, including the Supreme Court of the United States and the Sixth Circuit Court of Appeals, has held that federal courts cannot consider the testimony of judges regarding their mental processes. In the face of 99 years of consistent precedent, Mr. Post seeks to expand the record to include the statements of Judge Betleski and Judge Cirigliano regarding their consideration of the victim impact statement of Mr. Vantz during sentencing deliberations. These statements are not competent evidence and cannot be considered by this Court.

b. Significantly Different Posture of Claim

Expansion of the record to include the judges' statements regarding the victim impact statement also would place Mr. Post's Ninth Ground for Relief in such a significantly different evidentiary posture that he would not have fairly presented the claim to state courts.

Several courts have addressed the question of when additional evidence presented to a federal habeas court but not to the state courts alters a claim so significantly that it can no longer be said to have been fairly presented to the state courts. In Vasquez v. Hillery, the Supreme Court explained that additional evidence, in the form of two affidavits, did not fundamentally alter a ground for relief because the affidavits introduced no factual or legal claims upon which the state courts had not passed. 474 U.S. 254, 258-260 (1986).

However, in Sampson v. Love, 782 F.2d 53 (6th Cir. 1986), the Sixth Circuit encountered set of circumstances in which a claim was fundamentally altered. In Sampson, the petitioner's claim was that a jury's sentence was the product of vindictiveness because the jury found out about the petitioner's sentence in a previous trial. In the state courts, the petitioner alleged that there was a significant possibility that the jurors possessed this knowledge as a result of extensive publicity. In federal court, Mr. Sampson submitted two affidavits from jurors indicating that the jury had actual knowledge of the prior trial and sentence. Id. at 54. The Sixth Circuit held that the new affidavits placed the case in a significantly different and stronger evidentiary posture, and that, therefore, the state courts were not given a fair opportunity to consider the vindictiveness claim. Id. at 55. Consequently, the claim was unexhausted.

Similarly, in Wise v. Warden, the Fourth Circuit found that direct proof of an agreement between the State and the petitioner, which was presented for the first time of federal habeas review, significantly altered the posture of the legal claim such that the claim was not exhausted. 839 F.2d 1030, 1034 (4th Cir. 1988). The Court of Appeals stated,

> A claim is not rendered unexhausted simply because "bits of evidence" were not presented to the state courts. However, when critical evidence is presented for the first time to a federal habeas court, it cannot be said that the petitioner has "fairly presented" to the state courts the "substance" of his federal claim.

Id. at 1033. See also, Fautenberry v. Mitchell, 2001 WL 176438, *20 (S.D.Ohio).

In this case, the judges' statements regarding the victim impact statement were never presented to the Ohio courts on direct appeal or during postconviction proceedings. Nor was any other evidence of the judges' consideration of the statements offered. In fact, on direct review, the Supreme Court of Ohio found that the admission of the victim impact evidence was error, but held,

> Absent an indication that the panel was influenced by or considered the victim impact evidence in arriving at its sentencing decision, the admission of the victim impact statement as well as permitting the victim's son to address the court at the mitigation hearing did not constitute prejudicial error.

State v. Post, 32 Ohio St.3d 380, 384 (1987).

Clearly, the presentation of the statements of Judge Betleski and Judge Cirigliano regarding their consideration of the victim impact statement of Mr. Vantz during sentencing deliberations is critical evidence that significantly alters the posture of Mr. Post's Ninth Ground for Relief. With the affidavits, this claim would not have been fairly presented to the Ohio courts. However, Mr. Post has no remaining remedies in state

court. Therefore, Mr. Post's claim would be procedurally defaulted unless he could demonstrate cause and prejudice. As Mr. Post offers no explanation at all for his failure to obtain the judges' statements earlier and present them to the Ohio courts on postconviction review, introduction of the statements would render Mr. Post's legal claim defaulted. This effect is a second reason to deny Mr. Post's request to expand the record to include the judges' statements regarding the victim impact statements.

4. Judges' Statements Regarding Conversations with Defense Counsel McGough

The record can be expanded to include the judges' statements regarding conversations with Ms. McGough. Because the statements involve the judges' recollection of historical facts rather than their mental processes, there is no problem with admissibility. And because the record contains other, more definitive evidence regarding Ms. McGough's alleged conversations with Judge Betleski and Judge Cirigliano, the statements do not significantly alter Mr. Post's Second, Third, and Seventh Grounds for Relief.

5. Defense Counsel Duff's Affidavit

Mr. Duff's affidavit also can be considered by this Court. Most of the statements in Mr. Duff's affidavit already are contained in the record. None of the statements fundamentally alters Mr. Post's Eleventh Ground for Relief, the claim which they are offered to support.

6. Conclusion and Ruling Regarding Motion to Expand the Record

Mr. Post's Motion to Expand the Record is granted in part and denied in part. The record is expanded to include (1) the statements of Judge Betleski and Judge Cirigliano regarding their recollections of conversations with Ms. McGough and (2) Mr. Duff's entire affidavit. The Court will not consider the portions of the judges' affidavits concerning their alleged consideration of the victim impact statement of Mr. Vantz.

G. Petitioner Post's Motion for an Evidentiary Hearing

In his motion for an evidentiary hearing, Mr. Post seeks an opportunity to present evidence in support of his First through Ninth and Eleventh Grounds for Relief. (Docket # 82). Before examining the specific evidence Mr. Post contends he would likely offer at such a hearing, the Court will review the legal standards for determining whether a hearing may or must be held.

1. Standards

AEDPA expressly limits the power of federal courts to grant an evidentiary hearing. Section 2254(e)(2) provides,

> If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). In Williams v. Taylor, the Supreme Court explained that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." 529 U.S. 420, 432 (2000). The question is "whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Id. at 435. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437. If a claim is procedurally defaulted, "the determination of whether the petitioner has been diligent in developing his claim parallels the issue of whether he can show cause for his default." Hutchison v. Bell, 303 F.3d 720, 747 (6th Cir. 2002).

On the other hand, in Townsend v. Sain, 372 U.S. 293 (1963), the Supreme Court defined the circumstances in which a federal evidentiary hearing is mandatory. The Court held,

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Id. at 312-313. The Supreme Court then specified six circumstances in which a hearing was required:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a

> substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Id. at 313. Of course, the question of whether to grant a hearing pursuant to the fifth circumstance is now controlled by § 2254(e)(2). Williams, 529 U.S. at 434.

In Sumner v. Mata, 449 U.S. 539 (1981), the Supreme Court discussed what is meant by a state court hearing. Factual determinations made by a state appellate court after a review of the trial court record constitute a "hearing" where the parties were formally before the court, the petitioner was given an opportunity to be heard, and the petitioner's claim received plenary consideration. Id. at 546. See also, Mitchell v. Rees, 114 F.3d 571, 576 (6th Cir. 1997). Consequently, the deference to state court factual determinations required by § 2254 applies to the factual determinations of both trial and appellate courts. Id. at 546-547.

Thus, a habeas petitioner generally is entitled to an evidentiary hearing in federal court if (1) the petition alleges sufficient specific facts that, if true, would entitle the petitioner to relief, (2) relevant facts are in dispute, and (3) the state courts did not hold a full and fair evidentiary hearing. Stanford v. Parker, 266 F.3d 442, 459 (6th Cir. 2001); Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998). A hearing need not be held if there is no genuine issue of material fact (i.e., the relevant facts are well-developed or not disputed). Thompson v. Bell, 2003 WL 68282, *7 (6th Cir.); Davis v. Bagley, 2002 WL 193579, *2-3 (S.D.Ohio). Moreover, a hearing is not necessary if the facts the petitioner seeks to present are "clearly established in the record" and would be cumulative. Sawyer v. Hofbauer, 299 F.3d 605, 612 (6th Cir. 2002); Lefever v. Money, 225 F.3d 659, 2000 WL 977306, *8 (6th Cir.). Put another way, if a hearing would not

develop material facts relevant to a petitioner's federal constitutional claims, an evidentiary hearing is not required. McDonald v. Johnson, 139 F.3d 1056, 1060 (5th Cir. 1998).

2. Application

The Court will examine the evidence Mr. Post contends would likely be offered at an evidentiary hearing to support various Grounds for Relief. The organization of the Court's analysis will follow that of Mr. Post's motion.

a. First, Second, and Third Grounds for Relief

To support his first three Grounds for Relief, Mr. Post seeks a hearing to present evidence of the following:

1. Mr. Post's trial counsel misled and confused him regarding the consequences of any plea;
2. Mr. Post's counsel failed to obtain any advantage as a result of the no contest plea;
3. Mr. Post's counsel failed to conduct an adequate pretrial investigation;
4. Mr. Post's counsel lied to him by telling him she met with the trial court judge and had received assurances that Mr. Post would not be sentenced to death.[12]

[12] As a preliminary matter, the Court notes that, despite Mr. Post's section heading, these categories of alleged evidence relate to the First and Second Grounds for Relief (ineffective assistance of counsel at the guilt/innocence phase and involuntary plea due to ineffective assistance of counsel), not to the Third Ground for Relief (involuntary plea because there was no valid jury waiver).

Analysis of this alleged evidence demonstrates that Mr. Post is not entitled to a hearing with respect to it.

i. Alleged evidence that Mr. Post's trial counsel misled and confused him regarding the consequences of any plea.

Mr. Post received a state court evidentiary hearing on this issue on 3 October 1989 before Judge Zaleski for his petition for state postconviction relief. Mr. Post, Patricia Post, Mr. Duff, and Ms. McGough each testified at the hearing. Mr. Post and his sister-in-law testified regarding his alleged confusion about the consequences of a no contest plea. (Docket # 23, Ex. 4 at 12-14, 22, 68-69). Mr. Duff and Ms. McGough testified at length regarding what they did and did not tell Mr. Post. (Docket # 23, Ex. 4 at 27-28, 30, 33, 46-53, 58-60). Thus, although the "limited" evidentiary hearing focused on the somewhat-distinct claim that Mr. Post's counsel promised him that he would not receive the death penalty if he pled no contest, the hearing included substantial testimony concerning allegations that Mr. Post's counsel confused and misled him. If Mr. Post had additional evidence to offer, he had a responsibility to offer it then. As Mr. Post does not even assert that he meets the requirements of § 2254(e)(2), AEDPA prohibits this Court from granting a hearing to receive this alleged evidence.

Even if the Court had discretion to hold a hearing, it would not be warranted because this alleged evidence would be cumulative and repetitive. The record already contains multiple uncontested affidavits from Mr. Post and his family members regarding his alleged confusion. (Docket # 25, Ex. BB at Ex. E, F, G, H).

ii. Alleged evidence that Mr. Post's counsel failed to obtain any advantage as a result of the no contest plea.

The hearing before Judge Zaleski also addressed this issue. Sam Weiner, an attorney with expertise in death penalty litigation, testified regarding defense counsel's failure to obtain a plea agreement, to include a clause in the change of plea petition that would have permitted Mr. Post to withdraw his no contest plea if he was going to be sentenced to death, and to preserve the Holmok appellate issue through the drafting of the statement of facts. (Docket # 23, Ex. 4 at 89-91). He opined that the no contest plea conferred no benefit on Mr. Post and that defense counsel provided ineffective assistance. (Docket # 23, Ex. 4 at 90-91, 93, 95). Any additional evidence on this issue should have been offered at that time. As its exception is not met here, § 2254(e)(2) precludes a federal hearing on this issue.

Even if a hearing were permitted, Mr. Post is not entitled to such a hearing and it would not be helpful. The transcripts of the change of plea hearing and sentencing hearing make clear that there was no plea agreement, no agreed-upon sentence of less than death, and no dismissal of death penalty specifications.

iii. Alleged evidence that Mr. Post's counsel failed to conduct an adequate pretrial investigation.

Mr. Post is not entitled to a hearing to receive this alleged evidence. Mr. Post does not allege specific facts in his petition, traverse, or motion to support his claim of inadequate pretrial investigation that could be established at a hearing. The specific

facts he does allege are either clear from the face of the record or irrelevant to a claim of inadequate investigation. (Docket # 16 at 15-16). His only other factual allegation is vague: "failed to adequately investigate the guilt phase especially when the existence of un-indicted codefendants was an issue." (Docket # 16 at 15). There are no specific allegations of how the investigation was inadequate that could be the focus of an evidentiary hearing. Because the petition does not allege sufficient specific facts that, if true, would entitle the petitioner to relief, Mr. Post is not entitled to a hearing on this issue.

iv. Alleged evidence that Mr. Post's counsel lied to him by telling him she met with the trial court judge and had received assurances that Mr. Post would not be sentenced to death.

Mr. Post received a hearing on this issue during state postconviction proceedings before Judge Zaleski. In fact, the purpose of the hearing was to investigate Mr. Post's claim that his attorneys promised him that he would not receive a death sentence if he pled no contest. Ms. McGough and Mr. Duff each testified about Ms. McGough's conversations with the trial court judges and the non-existence of any assurances to Mr. Post that he would not receive the death penalty. (Docket # 23, Ex. 4 at 30, 33, 46-47, 58). Mr. Post also had an opportunity to testify in support of this factual claim. (Docket # 23, Ex. 4 at 12-14, 22). Thus, AEDPA bars another hearing on this issue. Even if the statute allowed for a federal hearing, Mr. Post is not entitled to such a hearing and the cumulative and repetitive nature of the evidence militates against holding one.

b. Seventh Ground for Relief

To support his Seventh Ground for Relief, Mr. Post seeks a hearing to present evidence of the following:

1. Mr. Post's trial counsel failed to employ a mitigation specialist to assist in the preparation of mitigation phase evidence;
2. Mr. Post's trial counsel failed to gather medical and school records to develop a cohesive mitigation theme;
3. Mr. Post's trial counsel failed to develop a mitigation theme around which to develop a trial strategy;
4. Mr. Post's trial counsel failed to create a mitigation team to assist in the collection of mitigation evidence;
5. Mr. Post's trial counsel called witnesses during the mitigation phase of the trial without preparing them.

Mr. Post is not entitled to a hearing on these issues for the reasons discussed below.

i. Alleged evidence that Mr. Post's trial counsel failed to employ a mitigation specialist to assist in the preparation of mitigation phase evidence.

This fact is clear from the record. Affidavits from a clinical psychologist with mitigation phase experience and from Mr. Post's relatives, neighbors, and friends attest to the fact that the defense team collected no records and sought no background information on Mr. Post from those who knew him for mitigation purposes. (Docket # 48, Ex. 5 at Ex. L1, L2, M, N, and P-X). Clearly, defense counsel did not employ a mitigation specialist to collect mitigation phase evidence. A federal evidentiary hearing, therefore, is not necessary to establish this fact and would not advance this claim.

ii. Alleged evidence that Mr. Post's trial counsel failed to gather medical and school records to develop a cohesive mitigation theme.

As discussed above, Dr. Nancy Schmidtgoessling's affidavit states that defense counsel did not collect any of Mr. Post's records in preparation for the mitigation hearing. (Docket # 48, Ex. 5 at Ex. J). This statement has not been disputed. Any further evidence of this fact offered at a hearing would be duplicative. Thus, a hearing on this issue is unnecessary.

iii. Alleged evidence that Mr. Post's trial counsel failed to develop a mitigation theme around which to develop a trial strategy.

Defense counsel's performance at the mitigation hearing is apparent from the transcript. The level of development of a mitigation theme is a question of interpretation and evaluation of this performance, not a fact that can be readily testified to at a hearing. To the extent that an observer can simply state that defense counsel lacked a mitigation theme, Dr. Schmidtgoessling made this statement in her affidavit when she opined, "the defense lacked sufficient knowledge of the petitioner to develop a mitigation theory." (Docket # 48, Ex. 5 at Ex. J at ¶ 17). Thus, any additional evidence concerning trial counsel's lack of a mitigation theme would be cumulative and would not warrant a hearing.

iv. Alleged evidence that Mr. Post's trial counsel failed to create a mitigation team to assist in the collection of mitigation evidence.

For the same reason that it is clear that defense counsel did not employ a mitigation specialist, the record, taken as a whole, shows that defense counsel did not create a mitigation team. A hearing need not be held to establish this fact.

v. Alleged evidence that Mr. Post's trial counsel called witnesses during the mitigation phase of the trial without preparing them.

Evidence of defense counsel's level of preparation of mitigation witnesses also is in the record. The record contains affidavits from Verona Post, Helen Post, and Patricia Post that state Mr. Duff prepared the three family-member witnesses together for a total of ten minutes prior to the mitigation hearing. (Docket # 48, Ex. 5 at Ex. F, M, Y). These affidavits are uncontested. Further evidence regarding mitigation witness preparation would be cumulative and does not warrant a hearing.

c. Eighth Ground for Relief

With respect to his Eighth Ground for Relief, Mr. Post claims that the following evidence would likely be presented at an evidentiary hearing:

1. The court-appointed psychologist was unable to prepare a report based on his brief interview with Mr. Post;
2. The psychologist did not conduct any meaningful testing of Mr. Post;
3. Counsel for the defendant did not conduct a thorough social history investigation of Mr. Post's background;
4. Because counsel for the defendant failed to conduct an adequate social history investigation of Mr. Post, the psychologist did not have sufficient data to develop an adequate psychological evaluation.

An examination of this alleged evidence demonstrates that Mr. Post is not entitled to a hearing to present it.

i. Alleged evidence that the court-appointed psychologist was unable to prepare a report based on his brief interview with Mr. Post.

This statement is directly contradicted by the record. Dr. Thomas Haglund, the Nord Center psychologist, sent an evaluation letter to Judge Betleski on 16 January 1985. (Docket # 24, Ex. I at A66-A68). In the letter, Dr. Haglund discussed Mr. Post's character, history, and background and offered his "clinical impression" of Mr. Post. As Mr. Post's assertion is patently erroneous, he is not entitled to a hearing on this issue.

ii. Alleged evidence that the psychologist did not conduct any meaningful testing of Mr. Post.

On the other hand, the record clearly establishes that Dr. Haglund conducted no psychological "testing" on Mr. Post. In his evaluation, Dr. Haglund explicitly states that his clinical impression is "based on several interviews" with Mr. Post. (Docket # 24, Ex. I at A67). Moreover, Dr. Schmidtgossling contends that the evaluation lacked appropriate "psychological testing." (Docket # 48, Ex. 5 at Ex. J at ¶ 16). No one has ever claimed that any psychological testing was done. As the evidence Mr. Post seeks to present is clearly established in the record and would be cumulative, a hearing on this issue is not necessary.

iii. Alleged evidence that counsel for the defendant did not conduct a thorough social history investigation of Mr. Post's background.

The extent of defense counsel's social history investigation is obvious from the record. As noted above, affidavits from Dr. Schmidtgoessling and from Mr. Post's relatives, neighbors, and friends consistently state that defense counsel collected none of Mr. Post's records nor sought any background information on Mr. Post from those who knew him. (Docket # 48, Ex. 5 at Ex. L1, L2, M, N, and P-X). In addition, Dr. Schmidtgoessling's opinion that the Mr. Post's background was not adequately researched is before the Court. (Docket # 48, Ex. 5 at Ex. J at ¶¶ 15, 16). As there is no genuine issue of material of fact with respect to this claim, a hearing would be unhelpful.

iv. Alleged evidence that, because counsel for the defendant failed to conduct an adequate social history investigation of Mr. Post, the psychologist did not have sufficient data to develop an adequate psychological evaluation.

This statement is more conclusory than factual. To the extent that the adequacy of the psychological evaluation is an issue of fact, Dr. Schmidtgoessling's view that the evaluation was deficient is contained in the record. (Docket # 48, Ex. 5 at Ex. J at ¶¶ 15, 16). Moreover, if necessary to the analysis of Mr. Post's Eighth Ground for Relief, the

Court can compare her evaluation with that of Dr. Haglund to determine whether the later was adequate. There is no factual issue to explore at a hearing.

d. Fourth, Fifth, and Sixth Grounds for Relief

To support his Fourth, Fifth, and Sixth Grounds for Relief, Mr. Post seeks a hearing to present evidence of the following:

1. Mr. Slusher was successful in getting Mr. Post to talk about the polygraph examination in August 1984;
2. The State began to seek information about the polygraph examination in June or July of 1984;
3. Only Mr. Hume, Mr. Duff, Mr. Holmok, and Mr. Post knew about the polygraph examination prior to August 1984.

An examination of this alleged evidence demonstrates that a hearing is not available to Mr. Post on these issues.

i. Alleged evidence that Mr. Slusher was successful in getting Mr. Post to talk about the polygraph examination in August 1984.

On 20 November 1984, Judge Betleski held a hearing on the questions of whether Mr. Post's statements to Mr. Holmok were privileged and, if so, whether the privilege was waived by Mr. Post's later disclosure of the statement to Mr. Slusher. Mr. Slusher testified that, in August 1984, Mr. Post told him that he signed a written confession during a polygraph examination with Mr. Holmok. (Docket # 78 at 29, 32). Moreover, the record already includes Mr. Slusher's 29 July 1984 letter indicating that he "got the complete story from Ron Post as to what happened on the night of the

murder." (Docket # 48, Ex. 5 at Ex. CC). As the state court held a hearing on this issue, Mr. Post is not entitled to another hearing. A federal hearing is not warranted because the evidence presented would be cumulative.

ii. Alleged evidence that the State began to seek information about the polygraph examination in June or July of 1984.

The 20 November 1984 suppression hearing included testimony from Mr. Slusher and Mr. Holmok. Mr. Holmok's involvement with the Post case and relationship with the defense team were thoroughly explored. If Mr. Post wanted to establish that the State began to seek information about the polygraph examination in June or July of 1984, Mr. Post should have questioned Mr. Holmok and Mr. Slusher about this issue at that hearing. His failure to do so triggers § 2254(e)(2)'s prohibition of a federal evidentiary hearing unless he meets one of the section's exceptions. Mr. Post has not even attempted to do so here. Thus, the Court cannot hold a hearing on this issue.

Even if the Court had the discretion to hold a hearing, it would be inappropriate to do so. This Court permitted three months of discovery with respect to the issues surrounding Mr. Slusher and Mr. Holmok. (Docket # 72). Yet, Mr. Post presented no new evidence or allegations in his traverse or motions to expand the record and for an evidentiary hearing with respect to these issues. As Mr. Post has provided no substantiation for this claim, even after having had an opportunity to do so in federal court, a hearing is not warranted. Moreover, as the substantive analysis of these Grounds for Relief will show, the establishment of this fact would not entitle Mr. Post to relief.

iii. Alleged evidence that only Mr. Hume, Mr. Duff, Mr. Holmok, and Mr. Post knew about the polygraph examination prior to August 1984.

The discussion that applied to the last issue applies here as well. This issue could have been explored at the state suppression hearing. Because it was not, the Court is prohibited from holding a hearing. Even if a hearing were permitted, it would not be warranted. Mr. Post could have investigated this issue during federal discovery. Either he did not elect to do so or the investigation produced no helpful information that could be presented at a hearing. In addition, even if this statement were true, the analysis of the Fourth, Fifth, and Sixth Grounds for Relief would not be affected.

e. Ninth Ground for Relief

With respect to his Ninth Ground for Relief, Mr. Post claims that the following evidence would likely be presented at an evidentiary hearing:

1. Counsel for Mr. Post called the victim's son as a witness during the mitigation phase of the trial;
2. Judge Betleski considered that son's statement to be a perfect summation of the facts of the case;
3. The statement of the victim's son served as an important factor in Judge Betleski's deliberative process and had a great impact on his opinion that death was the appropriate penalty;
4. Judge Cirigliano considered the victim impact statement delivered by the son;
5. The son's statement probably had a great impact on his thinking regarding the appropriateness of the death penalty.

The first issue does not require a hearing. The transcript of the mitigation hearing is part of the record. It includes Ms. McGough's statement, "We would now

request that the victim's family be permitted to speak." (Docket # 23, Ex. 2 at 88). The record speaks for itself.

The Court cannot accept the remaining evidence Mr. Post seeks to offer. This evidence involves the deliberations of Judges Betleski and Cirigliano. As the Court explained in the context of Mr. Post's motion to expand the record, this evidence is inadmissible. Furthermore, if admitted, the evidence would significantly alter Mr. Post's Ninth Ground for Relief such that it would not have been fairly presented to the state courts.

f. Eleventh Ground for Relief

In support of his Eleventh Ground for Relief, Mr. Post seeks to present the following evidence at a hearing:

1. The statement of facts was not stipulated to as true by Mr. Post;
2. There was no evidence to corroborate the facts contained in the statement of facts;
3. Defense counsel did not agree to the use of a statement of facts in lieu of the required procedures of calling witnesses to testify in open court;
4. The prosecutors were unfamiliar with the requirements of Rule 11(C), Ohio Rules of Criminal Procedure, and Section 2645.06, Ohio Revised Code;
5. Defense counsel suffered from the same unfamiliarity;
6. Absent the statement of facts there is no evidence of any aggravating circumstances.

For the reasons discussed below, Mr. Post is not entitled to a hearing on these issues.

i. Alleged evidence that the statement of fact was not stipulated to as true by Mr. Post.

This evidence already is contained in the record. First, the transcript of the no contest plea hearing includes the following statement by Mr. Duff:

> I want to make it clear, Your Honor, that our no contest plea, as I understand the law, is that admission of the facts contained in the indictment, and I don't want that to be misconstrued in any way that we agree or concur in their statement of facts; that they're not a stipulated statement of facts, they're the prosecutor's statement of facts.

(Docket # 23, Ex. 1 at 59). Second, the record has been expanded to include Mr. Duff's affidavit, which states, "as defense counsel, I objected to and . . . did not stipulate to the statement of the facts as presented by the prosecution or to the procedure utilized by the prosecution." (Docket # 83 at Ex. 3). Additional evidence on this issue would be cumulative and does not warrant a hearing.

ii. Alleged evidence that there was no evidence to corroborate the facts contained in the statement of facts.

This statement has two possible meanings. If Mr. Post seeks to present evidence that the prosecution offered no evidence at the change of plea hearing to accompany the statement of facts, the transcript of the hearing makes this clear. (Docket # 23, Ex. 1). If, on the other hand, Mr. Post seeks to present evidence that there was no evidence of his guilt at all, the record demonstrates that this statement is false. The PSR describes the substantial evidence of Mr. Post's guilt. (Docket # 24, Ex. I at A84-A90). The record includes Mr. Post's confessions to Mr. Holmok and to Mr. Slusher. (Docket # 78 at 40-41; Docket # 24, Ex. D at App. B; Docket # 48, Ex. 5 at Ex. CC). In the state postconviction hearing, Mr. Duff testified that the case was "a dead bang loser" and

"relatively hopeless or bleak" because Mr. Post "[c]onfessed to a lot of people." (Docket # 23, Ex. 4 at 31-32). Similarly, Ms. McGough expressed her opinion that the State's case was "very, very strong" because of Mr. Post's confessions to several individuals. (Docket # 23, Ex. 4 at 60-61). At the mitigation hearing, Mr. Post himself apologized for his "involvement in the death of Mrs. Helen Vantz." (Docket # 23, Ex. 2 at 69). Thus, to the extent that Mr. Post intends to argue that there is no evidence of his guilt, this argument clearly is belied by the record. Under either possible characterization of the evidence Mr. Post seeks to present, a hearing is not necessary.

iii. Alleged evidence that defense counsel did not agree to the use of a statement of facts in lieu of the required procedures of calling witnesses to testify in open court.

There is ample evidence regarding this issue in the record. Mr. Duff and Ms. McGough never objected to the use of a statement of facts during the change of plea hearing. (Docket # 23, Ex. 1). In fact, their certificate of counsel states that Mr. Post's "Attorneys will not contest nor deny the truth of the allegations contained in the prosecuting attorney's explanation of circumstances or statement of facts to the Court." (Docket # 23, Ex. 1 at 12; Docket # 49, Ex. 27). The expanded record also includes Mr. Duff's most recent affidavit, which expressly states,

> neither Ms. McGough nor I entered into an agreement with the prosecutors that a statement of facts could be used in lieu of the requirement that the three judge panel examine witnesses and hear any other evidence properly presented by the prosecutor in order to make a determination as to the guilt of the defendant.

(Docket # 83, Ex. 3 at ¶ 7). As these facts have been adequately developed, a hearing could only elicit cumulative and repetitive evidence.

iv. Alleged evidence that the prosecutors were unfamiliar with the requirements of Rule 11(C), Ohio Rules of Criminal Procedure, and Section 2645.06, Ohio Revised Code.

This proposition already is supported by the record. At the beginning of the change of plea hearing, Prosecutor Robert Nagy stated, "the State would present, as required by law, a statement of facts or explanation of circumstances that is required to be presented in some detail . . . prior to the acceptance of a plea of no contest." (Docket # 23, Ex. 1 at 5-6). Clearly, the face of the transcript reveals that Mr. Nagy was proceeding with the understanding that a statement of facts was sufficient. A hearing is not needed to re-establish this fact.

v. Alleged evidence that defense counsel suffered from the same unfamiliarity.

This evidence is in the record, as well. Defense counsel's failure to object to the procedure indicates that they thought it was the correct one. Moreover, Mr. Duff's newest affidavit states, "I believed when the prosecutor stated that he would read a statement of the facts, 'as required by law,' that he had researched the issue [and] he was correct that a statement of facts would satisfy the requirements of the law." (Docket # 83, Ex. 3 at ¶ 6). The Court need not hold a hearing to receive duplicative evidence.

vi. Alleged evidence that, absent the statement of facts, there is no evidence of any aggravating circumstances.

This statement also has two possible meanings. If Mr. Post seeks to present evidence that the prosecution offered no evidence of aggravating circumstances at the change of plea hearing along with the statement of facts, the transcript of the hearing

establishes this fact. (Docket # 23, Ex. 1). If, on the other hand, Mr. Post seeks to demonstrate that there was no evidence of the existence of any aggravating circumstance at all, the record shows that this statement is incorrect. As discussed above, there is substantial evidence in the record that the aggravated murder was committed while Mr. Post was committing aggravated robbery and was the principal offender in the commission of the aggravated murder. Furthermore, Mr. Post admitted the truth of that allegation when he pled no contest to aggravated murder with this death penalty specification. Either way, a hearing on this issue would serve no useful purpose.

g. Conclusion and Ruling Regarding Motion for Evidentiary Hearing

Because the Court's examination of the evidence Mr. Post claims he would likely offer at an evidentiary hearing shows that a hearing is not warranted or, for some issues, is prohibited, Mr. Post's motion for an evidentiary hearing is denied. The Court will analyze Mr. Post's Grounds for Relief based on the state court record, as expanded by this Court after a period of limited federal discovery.

H. Procedural Default

Before examining the merits of Mr. Post's claims, the Court must address the State's contention that part or all of the First, Third, Sixth, and Eighth Grounds for Relief are procedurally defaulted and barred on federal habeas corpus review.

1. General Law

"It is well established that '[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Combs v. Coyle, 205 F.3d 269, 274 (6th Cir 2000), quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991). As noted in the exhaustion section, if a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims. O'Sullivan, 526 U.S. at 848; Rust v. Zent, 17 F.3d at 160.

In Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit outlined the analysis to be followed when a state argues that a habeas claim is defaulted because of a prisoner's failure to observe a state procedural rule:

> First, the federal court must determine whether there is a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction -- that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001). To be independent, a state procedural rule and the state courts' reliance on it "must rely in no part on federal law." Fautenberry v. Mitchell, 2001 WL 1763438, * 24 (S.D. Ohio), citing Coleman, 501 U.S. at 732-733). To be adequate, a state procedural rule must be "firmly established and

regularly followed" by the state courts at the time it was applied. Id., citing Ford v. Georgia, 498 U.S. 411 (1991); Williams v. Coyle, 260 F.3d at 693.

In determining whether the Maupin factors are met, the federal court looks to the last explained state court judgment. Combs, 205 F.3d at 275; Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991). If the last reasoned opinion on a claim explicitly imposed a procedural default, there is a presumption, which can be rebutted with strong evidence to the contrary, "that a later decision rejecting the claim did not silently disregard the bar and consider the merits." Ylst, 501 U.S at 803. "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review." Id. at 801.

If the three Maupin factors are met, the claim is procedurally defaulted. The federal court can excuse the default and consider the claim on the merits only if the petitioner demonstrates that (1) there was cause for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error or (2) a fundamental miscarriage of justice would result from a bar on federal review. Maupin, 785 F.2d at 138; Hutchison v. Bell, 303 F.3d 720, 735 (6th Cir. 2002); Combs, 205 F.3d at 274-275.

A petitioner can establish cause in two ways. First, a petitioner may "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986); Mohn v. Bock, 208 F.Supp.2d 796, 801 (E.D.Mich. 2002). Objective impediments include an unavailable claim or interference by officials that made compliance impracticable. Murray, 477 U.S. at 488; Mohn, 208 F.Supp.2d at 801. Second, constitutionally

ineffective assistance of counsel constitutes cause. Murray, 477 U.S. at 488-489; Mohn, 208 F.Supp.2d at 801, 804; Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994).

To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." Perkins v. LeCureux, 58 F.3d 214, 219 (6th Cir. 1995), quoting United States v. Frady, 456 U.S. 152, 170 (1982). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." Simpson v. Jones, 238 F.3d 399, 409 (6th Cir. 2000).

Alternatively, a petitioner may demonstrate a miscarriage of justice by providing "clear and convincing evidence that but for constitutional error no reasonable juror would have found him guilty of the crime, or, if the constitutional error occurred during the penalty phase of the trial, that no reasonable juror would have sentenced petitioner to death." Greer v. Mitchell, 264 F.3d 663, 673 (6th Cir. 2001). Thus, a showing of actual innocence is required.

If a petitioner asserts ineffective assistance of counsel as cause for a default, that ineffective assistance claim must itself be presented to the state courts as an independent claim before it may be used to establish cause. Murray v. Carrier, 477 U.S. 478, 488-489 (1986). If the ineffective assistance claim is not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and can only be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective assistance claim. Edwards v. Carpenter, 529 U.S. 446, 452, 453 (2000).

2. Ohio's Res Judicata Rule

One of Ohio's state procedural rules is the res judicata doctrine. In State v. Perry, the Supreme Court of Ohio held that constitutional issues cannot be considered in Ohio postconviction proceedings where they already have been or could have been fully litigated by a prisoner represented by counsel on direct appeal. 10 Ohio St.2d 175, 176 (1967). In State v. Cole, the court further explained, "Where defendant, represented by new counsel upon direct review, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant's petition for postconviction relief." 2 Ohio St.3d 112, 112 (1982).

3. Petitioner Post's General Arguments Regarding Procedural Default

In response to the State's contention that some of his claims are procedurally defaulted, Mr. Post offers two broad arguments against recognizing any procedural default of his claims.

First, Mr. Post argues that procedural defaults based on Ohio's system of postconviction relief should not bar federal habeas review because the system violates due process. He asserts, "The State of Ohio's postconviction remedy is designed to create procedural defaults for the sake of judicial convenience." (Docket # 84 at 23). With the exception of his assertion that "[d]efendants are required to attach documentation to their petitions but are denied access to necessary documentation," Mr. Post does not elaborate on or substantiate this broad claim. (Docket # 84 at 23).

Mr. Post's argument does not defeat any applicable procedural default. In Greer v. Mitchell, the petitioner attacked Ohio's postconviction scheme on the ground that it allegedly "fails to provide defendants an adequate corrective process for reviewing claims of constitutional violations." 264 F.3d 663, 681 (6th Cir. 2001). Noting that states have no constitutional obligation to provide any postconviction remedies, the Sixth Circuit rejected the argument on the ground that "habeas corpus cannot be used to mount challenges to a state's scheme of postconviction relief." Id. This is exactly what Mr. Post is attempting to do.

In addition, the few cases cited by Mr. Post do not support his proposition that Ohio's postconviction system violates due process. See Allen v. Mitchell, 1:99CV1067, 35-38 (N.D. Ohio 2002) (examining these cases); Beuke v. Collins, C-1-92-507, 68-69 (S.D. Ohio 1995). A similar argument was rejected in Jamison v. Collins, 100 F.Supp.2d 521, 566-570 (S.D. Ohio 1998), as well.

Second, Mr. Post contends that Ohio's res judicata rule is not an "adequate" rule and, therefore, cannot support a procedural default. He argues that the Perry rule is inconsistently applied in capital and postconviction cases because the Supreme Court of Ohio sometimes inexplicably decides to address the merits of a claim that ran afoul of the rule. He asserts, "the Ohio Supreme Court sporadically forgives apparent waivers and defaults." (Docket # 84 at 26). Mr. Post also argues that the Perry rule is inadequate to the extent that it requires claims of ineffective assistance of trial counsel to be raised on direct appeal.

Mr. Post's claim of inconsistent application of the Perry rule is unavailing. The Sixth Circuit specifically has held that Ohio's res judicata doctrine is an adequate and

independent procedural rule that is firmly established and consistently followed. See, Mason v. Mitchell, 2003 WL 252101, *16 (6th Cir.) (noting that the Sixth Circuit has reiterated that the res judicata doctrine is an adequate and independent state ground justifying foreclosure of constitutional claims on habeas review); Buell v. Mitchell, 274 F.3d 337, 349 (6th Cir. 2001) (stating that the Perry rule is regularly and consistently applied by Ohio Courts as required by the Maupin test); Greer, 264 F.3d at 673 (describing the rule as long-standing and noting that the Sixth Circuit has rejected contentions that the Ohio courts have not consistently applied the rule); Brooks v. Edwards, 96 F.3d 1448, 1996 WL 506505, * 5 (6th Cir.) (holding that the "doctrine of res judicata has been explicitly set forth in numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under this doctrine"); Rust, 17 F.3d at 155, 160 (deciding that the doctrine of res judicata is an adequate and independent state ground). Federal district courts in Ohio also have examined and rejected similar arguments. See Allen at 29-34 (stating that Ohio courts do not ignore or arbitrarily decline to apply the Perry rule on a regular basis); Bueke 63-65.

Moreover, Mr. Post's argument that the Perry rule is inadequate to the extent that it requires claims of ineffective assistance of trial counsel to be raised on direct appeal is not well-taken. The cases cited by Mr. Post to support his argument are inapposite; they merely indicate a federal preference that ineffective assistance of counsel claims be litigated in § 2255 proceedings rather than on direct federal appeal. As noted in other district court opinions addressing this argument, none of these cases even suggest that a state rule requiring petitioners to raise ineffective assistance of counsel claims on direct review is inadequate. Jamison, 100 F.Supp.2d at 570-572; Bueke at 69-71.

Furthermore, the Perry rule, as modified by Cole, specifically differentiates between claims that can be brought based on the record alone and claims that depend on evidence outside the record. Obviously, certain ineffective assistance claims, such as the failure to object to remarks by a prosecutor at trial, can be brought on the basis of the record alone, while others cannot. As the Perry rule distinguishes between these two types of cases, Mr. Post's argument that the rule is inadequate lacks merit.

4. Specific Grounds for Relief Regarding Procedural Default

The State argues that part of the First Ground for Relief, all of the Third and Sixth Grounds for Relief, and possibly all of the Eighth Ground for Relief are procedurally defaulted. The Court will examine each of these Grounds for Relief in turn.

a. First Ground for Relief (Ineffective Assistance of Counsel During Guilt Phase)

In his First Ground for Relief, Mr. Post alleges ineffective assistance of counsel at the guilt/innocence phase of the trial. The State argues that the ineffective pretrial investigation aspect of this claim is procedurally defaulted. Specifically, the State asserts that this sub-claim ran afoul of the res judicata doctrine because Mr. Post raised this sub-claim for the first time in state postconviction proceedings, rather than on direct review.

In Ohio postconviction proceedings, the Court of Common Pleas and Court of Appeals each held that the investigation claim was barred by the Perry rule. Neither court addressed the merits of the claim.

However, Mr. Post contends that the doctrine of res judicata is not applicable because, under Cole, where appellate counsel was previously trial counsel, appellate counsel is not required to claim on direct appeal that he was previously ineffective. Mr. Post asserts that where one trial attorney is joined by new co-counsel on direct appeal, the conflict of the trial attorney is imputed to new co-counsel and, therefore, an ineffective assistance claim can be brought on state postconviction review.

In State v. Cole, the Supreme Court of Ohio held only that where a defendant, represented by new counsel on direct review, fails to raise an ineffective assistance of trial counsel claim on direct review and this issue could fairly have been determined without resort to evidence outside the record, res judicata is a proper basis for dismissing the defendant's petition for state postconviction relief. 2 Ohio St.3d 112, 112 (1982). Cole left open the question of whether res judicata can be applied in a situation in which one trial attorney continues as counsel on direct appeal and is joined by new co-counsel. This question was first addressed by an Ohio Court of Appeals in December 1991 in State v. Zuern, 1991 WL 256497 (Ohio App. 1 Dist.). In Zuern, the Ohio Court of Appeals stated,

> Unless we presume . . . that new co-counsel entering upon a criminal case at the appellate level would deliberately not exercise his professional judgment or duty to assert the ineffectiveness of his co-counsel at trial if the record demonstrated a basis for such a claim, a presumption we adamantly reject, we perceive no reason why the reference in Cole to "new counsel" would not embrace new co-counsel as well as new independent counsel. Thus, we conclude that Cole is applicable to the case sub judice, and that the doctrine of res judicata may be invoked to bar assertion of his claims of ineffective assistance of counsel which do not rely on evidence dehors the record.

Id. at 12.

Here, Mr. Post's trial counsel were Michael Duff and Lynett McGough. On direct appeal, Mr. Duff was joined by new co-counsel, Daniel Wightman. The Ohio Court of Appeals rendered a decision on 15 January 1986, almost six years before Zuern was decided. The Sixth Circuit analysis in Combs v. Coyle, therefore, is applicable to this case:

> Zuern was not decided until after the court of appeals had ruled on Comb's direct appeal. We must instead look to established state law at the time Combs pursued his appeal. Cole was the authoritative case at that time, and Cole does not speak to a situation in which trial counsel continues on appeal with the addition of new co-counsel. Because there is an ambiguity surrounding the issue and because the State cannot point to a case firmly establishing as of the time of Comb's appeal that ineffectiveness claims must be brought on direct appeal when trial counsel also serves as co-counsel on appeal, we are unable to conclude that a firmly established state procedural rule existed.

205 F.3d 269, 276-277 (6th Cir. 2000). See also, Loraine v. Coyle, 291 F.3d 416, 425 (6th Cir. 2002). The Sixth Circuit further noted that the Zuern rule might not even qualify as a firmly established state procedural rule today because the Supreme Court of Ohio has not addressed the issue and there is no consensus among the Ohio Courts of Appeals. Id. at 277, n. 4.[13]

Thus, in 1986, there was no firmly established state procedural rule requiring Mr. Post, who had one new attorney and one previous trial attorney on direct appeal, to bring his ineffective pretrial investigation claim on direct appeal. As there was no such adequate and independent state procedural rule, Mr. Post's ineffective pretrial investigation claim is not procedurally defaulted.[14]

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[13] Although Combs was decided in 2000, this assessment remains accurate today.

[14] The fact that Mr. Post had completely new counsel, the Ohio Public Defender's Office, for his direct appeal before the Supreme Court of Ohio does not affect this

b. Third Ground for Relief (No Valid Jury Waiver)

In his Third Ground for Relief, Mr. Post contends that his no contest plea was involuntary because there was no valid waiver of a jury trial. The State argues that this claim is procedurally defaulted because it was never presented to any state court on direct appeal or in postconviction proceedings. Mr. Post offers two responses: (1) the voluntariness of his jury waiver was raised in his petition for state postconviction relief and (2) this issue is jurisdictional and, therefore, is unwaivable and can be raised at any time.

Mr. Post's arguments are not well-taken. First, although Mr. Post raised the issue of the voluntariness of his no contest plea in the Second Cause of Action of his petition for postconviction relief before the Court of Common Pleas, this cause of action did not refer to the issue of a jury waiver at all. The claim was that the plea "was not a knowing and intelligent choice among the alternative courses of action open to Petitioner." (Docket # 25, Ex. BB). This is not the same claim. In fact, Mr. Post never raised a jury waiver claim with any Ohio court.

Second, Ohio courts have consistently rejected the assertion that a jury waiver claim can be raised at any time. It is true that a judgment of conviction is void if rendered by a court that lacks jurisdiction over the defendant or the subject matter, and that the issue of a court's subject matter jurisdiction cannot be waived. Perry, 10 Ohio St.2d at 175-176; State v. Wilson, 73 Ohio St.3d 40, 46 (1995). It is also true that a

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conclusion because, under Supreme Court of Ohio rules and precedents, the court will not consider federal constitutional claims that have not been presented initially to the Ohio Court of Appeals. Smith v. Anderson, 104 F.Supp.2d 773, 799 (S.D. Ohio 2000).

written jury waiver must be filed "in order for the trial court to have jurisdiction to try the defendant without a jury." State v. Tate, 59 Ohio St.2d 50, 50 (1979).

However, Ohio courts have consistently found that this reference to "jurisdiction" is not a reference to subject matter jurisdiction. In State v. Pless, the Supreme Court of Ohio reiterated the holding that strict compliance with the requirements of R.C. 2945.05, which governs jury waivers, is required for a court to try the defendant without a jury. 74 Ohio St.3d 333, 333-334 (1996). Yet, the Pless court also expressly held that "[t]he failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction." Id. at 334. In State v. Swiger, the Ohio Court of Appeals observed,

> If the "jurisdiction" to which the court referred were subject matter jurisdiction, by its very nature, it would be open to challenge at any time. By holding that this defect in the trial court's "jurisdiction" can be waived if not timely raised, the Supreme Court was apparently referring to something other than subject matter jurisdiction.

125 Ohio App.3d 456, 465 (1998). The Court of Appeals held, "Any challenge to the propriety of defendant's waiver . . . could have been raised on direct appeal, and was barred by res judicata." Id.

In State v. Filiaggi, a case involving a closely-related jurisdictional issue, the Supreme Court of Ohio stated that the jurisdictional matter of a three-judge panel cannot be waived. 86 Ohio St.3d 230, 239, n. 1 (1999). However, the court then found "persuasive the cogent reasoning of another state court" and included the following analysis in its opinion:

> In cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. It may not be called into question collaterally.

Id. at 240 (emphasis in original). The inclusion of this passage by the Supreme Court of Ohio clearly indicates that a jury waiver issue is not jurisdictional in the sense that it relates to subject matter jurisdiction or can be raised at any time. The claim is waived if not presented on direct appeal.

Numerous recent decisions by the Ohio Courts of Appeals and the Supreme Court of Ohio support this interpretation. See, Collier v. Gansheimer, 2002 WL 369977, *5 (Ohio App. 11 Dist.) (stating "the Pless analysis is logical only if the type of jurisdiction referenced by the Supreme Court is not subject matter jurisdiction, but statutory jurisdiction over a particular case."); Rideau v. Russell, 2002 WL 31682353, *1 (Ohio App. 12 Dist.) (holding "the failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from the criminal conviction . . . The failure to strictly comply with R.C. 2945.05 does not entitle a defendant to extraordinary relief in habeas corpus."); State v. Haliym, 2001 WL 1002232, *3 (Ohio App. 8 Dist.) (noting that a jury waiver claim may be raised only in a direct appeal and not in a postconviction petition.); State v. Sims, 2001 WL 741528, * 2 (Ohio App. 7 Dist.) (reiterating Pless holding that a jury waiver claim must be brought on direct appeal); State v. Jones, 91 Ohio St.3d 403, 404 (2001) (holding that "a claimed violation of the jury-trial waiver requirements of R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction."); Bradford v. Moore, 90 Ohio St.3d 75, 75 (2000) (ruling that "a claimed violation of R.C. 2945.05 is not the proper subject for habeas corpus relief and may be remedied only in a direct appeal from a criminal conviction."); State v. Mitchell, 87 Ohio St.3d 259, 260 (1999) (same).

Thus, Mr. Post's second argument fails. As the jury waiver issue does not implicate the trial court's subject matter or personal jurisdiction, it cannot be raised at

any time. Mr. Post's jury waiver claim is procedurally defaulted because he never raised it before any state court, let alone on direct appeal as required by Ohio law.

Mr. Post argues that the procedural default should be excused because his appellate counsel were constitutionally ineffective.[15] This ineffective assistance of appellate counsel claim itself had to be presented to the state courts as an independent constitutional claim to be used to establish cause. Murray v. Carrier, 477 U.S. 478, 488-489 (1986). In State v. Murnahan, the Supreme Court of Ohio held that ineffective assistance of appellate counsel claims are not cognizable in postconviction proceedings, but may be raised in an application for delayed reconsideration in the court of appeals. 63 Ohio St.3d 60 (1992). Ohio Rule of Appellate Procedure 26 provides that such an application must be filed "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Ohio R.App. P. 26(B)(1).

In this case, the Court of Appeals completed its direct review of Mr. Post's conviction and sentence on 15 January 1986. Yet, Mr. Post never raised any ineffective assistance of appellate counsel claim in his petition for postconviction relief or, in the decade that has passed since the Murnahan decision and the current version of Rule 26 took effect, in an application for delayed reconsideration. He has presented no indication of any good cause for this failure. Mr. Post's claim of ineffective assistance of appellate counsel is itself, therefore, procedurally defaulted. Mr. Post has not even

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[15] In a general procedural default section of his traverse, Mr. Post also mentions ineffective assistance of trial counsel as cause for any defaults. (Docket # 84 at 34). He provides no explanation for how any deficiency of his trial counsel could have prevented his appellate counsel from raising any claims on direct appeal. This unexplained reference does not establish cause for a default.

alluded to, let alone demonstrated, cause and prejudice for this secondary default. Accordingly, he cannot rely on an ineffective assistance of appellate counsel claim to supply cause for his underlying procedural default of the jury waiver claim. The default of the jury waiver claim is not excused and bars federal habeas relief on this claim.

c. Sixth Ground for Relief (Failure to Disclose Favorable Evidence)

Mr. Post's Sixth Ground for Relief alleges that the prosecution failed to disclose favorable evidence to him in violation of Brady v. Maryland, 373 U.S. 83 (1963). The State argues that this claim is procedurally defaulted. Specifically, the State contends that this claim, which Mr. Post first presented to the Ohio courts on postconviction review, had to be brought on direct appeal pursuant to the doctrine of res judicata.

Mr. Post responds that he presented this claim to the Ninth District Court of Appeals on direct appeal as his First Assignment of Error. He admits that "the characterization of the error is not exactly the same." (Docket # 84 at 78).

The Court of Appeals expressly denied postconviction relief on this claim on the ground of res judicata. (Docket # 27, Ex. RR). No state court considered the claim on the merits. Despite Mr. Post's claim to the contrary, he did not raise this claim, or any claim similar to it, on direct appeal. His First Assignment of Error on direct appeal was that "[t]he trial court erred by not suppressing a confidential communication between the appellant and a defense-related expert." (Docket # 24, Ex. D). A suppression claim based on attorney-client privilege is not equivalent to a prosecutorial misconduct claim based on an alleged failure to disclose Brady material. As discussed above, res judicata is an adequate and independent state procedural rule. The Ohio courts have

determined that Mr. Post ran afoul of this rule with respect to his Brady claim. Thus, Mr. Post's Sixth Ground for Relief is procedurally defaulted.

Mr. Post asserts that the cause for this default was the ineffective assistance of appellate counsel. As this Court explained above, this claim is itself defaulted and Mr. Post has not demonstrated cause and prejudice as to this secondary default. Therefore, the underlying default cannot be excused and the habeas claim is barred.

d. Eighth Ground for Relief (Ineffective Assistance of Counsel Regarding Expert)

Mr. Post's Eighth Ground for Relief alleges a denial of his right to expert assistance. Respondent states that he is unsure whether this is an ineffective assistance of counsel claim or a claim that Dr. Haglund's psychological evaluation was itself inadequate. Respondent contends that, if the latter is the correct interpretation of the claim, then it is procedurally defaulted because it was not presented on direct appeal as required by the Perry rule. (Docket # 22 at 47-48).

Mr. Post responds that this is a pure ineffective assistance of counsel claim. He represents, "the gravamen of this ground for relief is trial counsel's failure of their duty to provide Mr. Post with the kind of effective assistance of counsel that the United States Constitution requires a capitally charged defendant must receive." (Docket # 84 at 91). Mr. Post's briefing of this issue supports this statement. Thus, as the State concedes, this claim is not procedurally defaulted.

I. Merits Analysis

1. First Ground for Relief (Ineffective Assistance of Counsel During Guilt Phase)

In his First Ground for Relief, Mr. Post claims that his trial counsel, Mr. Hume, Mr. Duff, and Ms. McGough, provided him with constitutionally ineffective assistance throughout the guilt/innocence phase of his case. In his petition and traverse, Mr. Post offers a laundry list of largely unexplained alleged failures of his trial counsel. Essentially, Mr. Post contends that his counsel were deficient in their pretrial investigation and during plea negotiations and his entrance of a no contest plea.

a. Applicable Law

In Strickland v. Washington, 466 U.S. 668 (1984), the U.S. Supreme Court formulated the standards for ineffective assistance of counsel that were applicable during Mr. Post's state appeals and remain applicable today. The Supreme Court explained, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or capital sentencing proceeding] cannot be relied on as having produced a just result." Id. at 686-687. A violation of the right to effective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

To demonstrate that counsel's performance was deficient, the defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [under] prevailing professional norms." Id. at 687-688. The Strickland court further explained,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, a defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689-690. Thus,

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690. The Supreme Court emphasized,

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id.

With respect to the prejudice analysis, the Supreme Court held,

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision" and "should not depend on the idiosyncracies of the particular decisionmaker." Id. at 695.

Federal courts may address either the performance or prejudice element if one is dispositive. Id. at 697. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to AEDPA's presumption of correctness, ultimate decisions on the performance and prejudice components are mixed questions of law and fact that are not entitled to this presumption. Id. at 698; Abdur'rahman v. Bell, 226 F.3d 696, 702 (6th Cir. 2000). "There is no question that Strickland qualifies as clearly established federal law under AEDPA." Wickline v. Mitchell, 2003 WL 193437, * 2 (6th Cir. 2003).

Two other Supreme Court cases, which were also clearly established federal law at the time the Ohio courts addressed Mr. Post's ineffective assistance of counsel claims, elaborate on the Strickland standard. In Kimmelman v. Morrison, the Supreme Court explained that it is generally appropriate to assess counsel's overall performance when determining whether counsel provided effective assistance. 477 U.S. 365, 386

(1986). In Hill v. Lockhart, the court held that the Strickland test applies to guilty pleas. 474 U.S. 52, 58-59 (1985). In a plea situation, to establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

b. Analysis

The Court will examine each of Mr. Post's allegations of trial counsel failures in turn. To the extent that the Ohio courts examined the merits of Mr. Post's claim that his counsel were ineffective during plea negotiations and with respect to his no contest plea, Mr. Post is entitled to relief on this claim only if the decision of the relevant Ohio court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." As the Ohio courts never examined the merits of Mr. Post's ineffective pretrial investigation claim, this Court will determine for itself whether Mr. Post's counsel were constitutionally ineffective in this respect.

i. Pretrial Investigation

Under Mr. Post's broad claim of ineffective pretrial investigation, his first allegation is that counsel "failed to adequately investigate the guilt phase especially when the existence of un-indicted codefendants was an issue." (Docket # 16 at 15). Putting aside

the fact that someone who was never indicted cannot be Mr. Post's co-defendant, this allegation does not support a claim of deficient performance. The allegation is non-specific; Mr. Post offers no explanation as to what should have been investigated but was not and why this alleged lack of investigation was unjustified. He alleges no facts and points to no evidence in the record to support his assertion.

Mr. Post's next allegation is that his attorneys "failed to file a motion to suppress Mr. Post's statement of April 13, 1984, to the Elyria Police Department." (Docket # 16 at 15). Mr. Post offers no description of the circumstances of his statement. He fails to even allege a possible basis for such a motion to suppress. There is no argument at all as to how counsel's failure to move to suppress this statement was unreasonable. Thus, this allegation does not support his claim of ineffective assistance of counsel.

Mr. Post alleges that his counsel "failed to request the trial court make specific findings of fact (pursuant to Crim. R. 12(E)) as to the motion to suppress that was filed." (Docket # 16 at 15). Apparently, Mr. Post is referring to the motion to suppress his confession to Mr. Holmok, the polygraphist. Yet, he gives no indication of how this alleged failure was unreasonable. Nor does Mr. Post make any argument about how he was prejudiced by counsel's failure to make the request.

Mr. Post also alleges that counsel "failed to employ an independent polygraphist as Robert Holmok was also conducting polygraphs for the Elyria Police Department on the case." (Docket # 16 at 15-16). Mr. Post does not point to any evidence in the record to support his assertion that Mr. Holmok was working for the Elyria Police on his case. A review of the record reveals that there is no such evidence. Moreover, at the 20 November 1984 hearing before Judge Betleski, Mr. Holmok testified that he

interviewed Mr. Post at Mr. Hume's direction in order to assist the defense in the preparation of its case and that he considered the conversation confidential. (Docket # 78 at 10-11). There is no evidence that Mr. Holmok served as anything other than an independent defense expert.

Mr. Post's fifth allegation is that defense counsel "failed to be present when Holmok conducted the polygraph examination of Mr. Post." (Docket # 16 at 16). He provides no argument as to why his counsel needed to be present. Mr. Post does not explain why counsel's reason for not attending, whatever it was, was inadequate. He does not even assert that this specific failure prejudiced him in any way.

Next, Mr. Post alleges that his attorneys "failed to file a Motion to Suppress the statement of Richard Slusher concerning Mr. Post's statements." (Docket # 16 at 16). Presumably, Mr. Post is referring to the 29 July 1984 letter, in which Mr. Slusher describes Mr. Post's confession to him. (Docket # 48, Ex. 6 at Ex. CC). Like similar allegations discussed above, this assertion does not support a claim of ineffective assistance. Mr. Post does not present any basis for the suppression of Mr. Slusher's statement. Furthermore, he makes no argument as to how his counsel's failure to move to suppress this statement was unreasonable.

Mr. Post contends that his counsel "failed to adequately cross-examine jailhouse informant Richard Slusher at the evidentiary hearing of November 20, 1984." (Docket # 16 at 16). He makes no effort to explain how counsel's performance was deficient. There is no suggestion of which questions should have been asked or topics explored. Mr. Post does not explain how counsel's alleged failure prejudiced him.

Petitioner then asserts that his counsel "failed to ensure that all pretrial proceedings were recorded including sidebars and pretrial conferences pursuant to Crim. R. 22 and R.C. 2929.05." (Docket # 16 at 16). Assuming that defense counsel could have "ensured" that proceedings were recorded in this way, Mr. Post does not explain how counsel's failure to do so was unreasonable. Mr. Post does not state which sidebars or conferences should have been recorded but were not. Nor does he provide any indication of how any failure to record these sidebars or conferences prejudiced him.

Mr. Post's final allegation under his ineffective pretrial investigation claim is that counsel did not conduct an early mitigation investigation during the guilt stage in order "to make an informed tactical decision as to whether guilt or sentencing should be the focus of the case." (Docket # 16 at 15). Even assuming that defense counsel performed no mitigation investigation during the guilt stage, Mr. Post has not demonstrated prejudice because he has not shown that there is a reasonable probability that, but for counsel's errors, he would not have pled no contest and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. at 59.

Given the substantial evidence of his guilt, it is unlikely that Mr. Post would have elected to proceed to a jury trial. The PSR discussed Mr. Post's confessions to James Harsh, David Thacker, Sally Thacker, and John Thompson. (Docket # 24, Ex. I at A84-A90). Some of these confessions were taped by the police. (Docket # 24, Ex. I at A88-A90). The record also includes Mr. Post's confessions to Mr. Holmok and to Mr. Slusher. (Docket # 78 at 40-41; Docket # 24, Ex. D at App. B; Docket # 48, Ex. 5 at Ex. CC). The police were in possession of the murder weapon. (Docket # 24, Ex. I at A88-A90). After

Ralph Hall told the police that Mr. Post burned Ms. Vantz's handbag in a 50-gallon drum, the police located the drum, which contained remnants of a handbag and a nail polish bottle of the type used by Mrs. Vantz. (Docket # 24, Ex. I at A89). Mr. Duff described the case as "a dead bang loser" and "relatively hopeless or bleak" because Mr. Post "[c]onfessed to a lot of people." (Docket # 23, Ex. 4 at 31-32). Similarly, Ms. McGough expressed her opinion that the State's case was "very, very strong" because of Mr. Post's confessions to several individuals. (Docket # 23, Ex. 4 at 60-61). At the mitigation hearing, Mr. Post himself apologized for his "involvement in the death of Mrs. Helen Vantz." (Docket # 23, Ex. 2 at 69). Furthermore, the defense was aware of an audio tape of Mr. Post negotiating with someone over the telephone to kill a witness. (Docket # 23, Ex. 4 at 34). Mr. Slusher claimed that Mr. Post offered him money and a motorcycle to kill Ralph Hall because he could place Mr. Post at the Slumber Inn on the night of the murder. (Docket # 48, Ex. 6 at Ex. CC). Faced with all this evidence, it is unlikely that the failure of defense counsel to conduct an early mitigation investigation would have altered Mr. Post's decision to enter a plea of no contest.

Moreover, it is clear that defense counsel were focused on the mitigation phase from the very beginning. Mr. Duff testified that the goal of the defense was always to save Mr. Post's life. (Docket # 23, Ex. 4 at 26). Defense counsel did not need to conduct very much mitigation investigation to determine that the mitigation hearing would be the focus of the case.

None of the above allegations support Mr. Post's claim of ineffective pretrial investigation. Because Mr. Post has not demonstrated that his right to effective

assistance of counsel was violated due to ineffective pretrial investigation, he is not entitled to relief on this claim.

ii. No Contest Plea

Mr. Post presents nine allegations under his broad claim of ineffective assistance during plea negotiations and the entrance of his plea of no contest.

Mr. Post alleges that his counsel "permitted Mr. Post to enter a no contest plea without a commitment from the trial judges that this would be considered sufficient to save him from being executed." (Docket # 16 at 16). Put simply, it is not realistic to expect that a trial judge would guarantee a particular sentence before a change of plea hearing. Defense attorneys cannot reasonably be expected to obtain such a commitment. To have not done so is not ineffective assistance of counsel.

Mr. Post also asserts that his counsel "did not request the trial court to dismiss the death penalty specification in the interests of justice pursuant to Crim. R. 11(C)(3)." (Docket # 16 at 16). Because Mr. Post offers no reason why such a request would be justified and no indication that such a request would have been granted, he has not demonstrated either deficient performance or resulting prejudice.

Next, Mr. Post contends that his counsel "permitted Mr. Post to enter a no contest plea without having fully investigated mitigation." (Docket # 16 at 16). This repetitive allegation was discussed above and rejected as support for this ineffective assistance claim.

Petitioner asserts that his attorneys "permitted Mr. Post to enter a no contest plea and thereby relieve the State of Ohio of the burden of proving Mr. Post's guilt beyond a

reasonable doubt." (Docket # 16 at 16). All pleas of guilty or no contest relieve the State of this burden. Simply permitting a defendant to enter of plea of guilty or no contest, without more, does not constitute ineffective assistance of counsel.

Mr. Post alleges that defense counsel "permitted Mr. Post to plead no contest without his gaining any concession for the plea." (Docket # 16 at 16). The Ohio courts addressed this specific issue. On direct appeal, the Supreme Court of Ohio rejected Mr. Post's ineffective assistance of counsel claim, stating,

> the record reveals that the change in plea was part of a strategy designed to preserve, for appellate review, the trial court's ruling on the motion in limine [regarding the confession to Mr. Holmok]. Further, defense counsel was faced with overwhelming evidence of guilt, including several confessions by the appellant.

State v. Post, 32 Ohio St.3d 380, 388 (1987). On postconviction review, Judge Zaleski found,

> The record is quite clear in its entirety that as a result of the Petitioner's confession to various people, trial counsel were faced with an uphill battle, at best, and the chances of the defense prevailing at trial were bleak. In addition to the numerous confessions, Petitioner was under investigation for conspiracy to kill some of the State's witnesses. A tape containing the defendant's voice . . . documents Petitioner's participation in this conspiracy.
>
> Trial counsel's joint goal to save the Petitioner's life under these circumstances, through creation of a mitigating factor by pleading, was proper, logical, and not ineffective . . . .
>
> This Court specifically finds that Petitioner independently chose to enter a plea of no contest contrary to the advice of Attorney McGough, thereby defeating her attempt to have a guilty plea viewed as a mitigating factor by both the State and three judge panel.

(Docket # 26, Ex. NN at A-7, A-8). Similarly, the Ohio Court of Appeals found,

> In preparing Post's defense, his attorneys were faced with an uphill battle. Post had virtually no chance of prevailing at trial because the state had evidence that he had confessed his guilt to numerous individuals. Given

> the strength of the state's case, coupled with the lack of any statutory mitigating factors, the defense became focused on avoiding the death penalty. The state had offered Post a life sentence if he entered a plea of guilty. Therefore, Post was advised by his counsel to plead guilty. Post refused.
>
> Because Post refused to plead guilty, trial counsel presented him with the option of a no contest plea, and explained the consequences of such a plea. Although they hoped that the plea would be considered in mitigation, they never made any guarantees to Post.

(Docket # 27, Ex. RR at 5).

Mr. Post has not rebutted the presumption that the factual findings of the Ohio courts are correct. In fact, the testimony of Mr. Hume, Mr. Duff, Ms. McGough, and Mr. Post demonstrates that Mr. Post refused to plead guilty, despite the fact that a guilty plea would have allowed defense counsel to enter into a plea agreement in which Mr. Post's life would have been spared. (Docket # 23, Ex. 4 at 7, 10, 25, 26, 31-32, 41, 42, 48, 51, 52, 53). As discussed above, the record also clearly substantiates the finding that Mr. Post was very unlikely to prevail at trial.

Under these circumstances, this Court cannot say that the Ohio courts unreasonably applied Strickland when they held that defense counsel were not ineffective for permitting Mr. Post to enter a plea of no contest in the hope of having such a plea considered in mitigation by the three-judge panel. Although the superior option would have been the entrance of a guilty plea, which likely would have qualified as a mitigating factor, Mr. Post refused to plead guilty. It was not unreasonable for defense counsel to decide that the prospect of a no contest plea being considered a mitigating factor was better than the alternative of a nearly hopeless trial. As Judge Goodwin noted in Hendricks v. Calderon, "The choice to pursue a bad strategy makes

no comment on an attorney's judgment where no better choice exists." 70 F.3d 1032, 1042 (9th Cir. 1995).

Next, Mr. Post alleges that his counsel failed to adequately preserve the Holmok suppression issue by allowing the prosecution's statement of facts to not depend upon the statement of Mr. Post to the polygraphist. This allegation does not demonstrate ineffective assistance of counsel for three reasons. First, Mr. Duff and Ms. McGough each attempted to preserve the issue by requesting inclusion of Judge Betleski's ruling that the confession was admissible in the statement of facts. (Docket # 23, Ex. 1 at 12-13, 58-59). The prosecutor replied that he was not relying on Mr. Post's confession to Mr. Holmok, and the three-judge panel never required him to include the ruling in the statement of facts. (Docket # 23, Ex. 1 at 13-15). It is unclear what more defense counsel could or should have done. Mr. Post does not even make a suggestion.

Second, to the extent that any statement of facts could be taken in lieu of evidence, the prosecution's statement of facts was complete and sufficient without any reference to Judge Betleski's ruling on the admissibility of Mr. Post's confession. The statement of facts addressed each of the elements of the crimes to which Mr. Post was pleading no contest, even without inclusion of this confession, which was one among many.

Third, even if counsel's performance was deficient, Mr. Post did not suffer prejudice. On direct appeal, the Supreme Court of Ohio rejected Mr. Post's attorney-client privilege claim on the basis of Mr. Post's disclosure of the substance of his communications with Mr. Holmok to a third party, Mr. Slusher. State v. Post, 32 Ohio St.3d at 386. The court held that Mr. Post waived the privilege when he told Mr. Slusher

that he had confessed to Mr. Holmok. Id. Thus, the issue was preserved for appellate review and the Supreme Court of Ohio rejected the claim on the merits.

Next, petitioner alleges that his counsel "permitted the court to accept the no contest plea without the taking of evidence pursuant to Crim. R. 11(C)(3) and 11(C)(4)." (Docket # 16 at 16). The Supreme Court of Ohio has held that Rule 11(C)(3), "when read in pari materia with R.C. 2945.06, requires the three-judge panel, upon acceptance of a no contest plea to the charge of aggravated murder, to hear evidence in deciding whether the accused is guilty of aggravated murder beyond a reasonable doubt." Id. at 393-393. The record shows that this procedure was not followed; a statement of facts was read by the prosecutor instead. The record also shows that defense counsel were unaware of this requirement. In an affidavit, Mr. Duff stated, "I believed when the prosecutor stated that he would read a statement of the facts, 'as required by law,' that he had researched the issue . . . [and] was correct that a statement of facts would satisfy the requirements of the law." (Docket # 83, Ex. 3 at ¶ 6). Moreover, a review of the transcript of the change of plea hearing reveals that defense counsel did not object to the procedure that was followed. Thus, it is clear that defense counsel's performance fell below an objective standard of reasonableness.

However, Mr. Post has not demonstrated that this deficient performance actually prejudiced him. Given the substantial evidence of his guilt available in the record, there is no reasonable probability that the panel would have refused to accept Mr. Post's no contest plea after hearing testimony. Although defense counsel should have insisted that the court follow the proper procedure, it is very likely that the taking of testimony

would not have affected the outcome of the proceeding. Because Mr. Post has not established prejudice, this claim of ineffective assistance fails.

Petitioner then contends that his counsel "permitted Mr. Post to plead no contest to three gun specifications, two counts of Aggravated Murder and one count of Aggravated Robbery when at most he was guilty of one gun specification, one count of Aggravated Murder and one count of Aggravated Robbery." (Docket # 16 at 17). Mr. Post does not explain this confusing allegation. Even if Mr. Post did plead to too many counts as a result of his counsel's performance, he suffered no prejudice as a result. Mr. Post was sentenced on only one count of aggravated murder, one gun specification, and one count of aggravated robbery. The prosecution elected to proceed with one of the two aggravated murder counts at sentencing and the three-judge panel heard evidence and arguments on that count only.

Finally, Mr. Post alleges that defense counsel "informed Mr. Post that he would not receive the death penalty in exchange for the no contest plea." (Docket # 16 at 17). The Ohio courts rejected this argument on postconviction review. After holding an evidentiary hearing on this issue, Judge Zaleski wrote,

> Attorney McGough and Attorney Duff both testified that neither guaranteed nor led Mr. Post to believe that his life would be spared.
>
> Both co-counsel testified that they informed the Petitioner of their beliefs, opinions, and advice concerning the imposition of the death penalty. Both counsel testified that they informed the Petitioner that the death penalty was a distinct possibility. Both counsel denied ever leading Petitioner to believe his life would be spared if he entered a plea of no contest . . .
>
> Attorney McGough testified at [the] hearing that she advised the defendant that all three (3) judges would impose a death penalty on a no contest plea, contrary to the Petitioner's allegations and testimony . . .

> Petitioner was fully advised of his rights and the possible penalties at the time he entered his plea before a three judge panel.
>
> The dialogue between the panel accepting the plea and the Petitioner was extensive, as was the cross-examination of the Petitioner on this issue at the hearing before this court.
>
> The court specifically finds that the testimony of trial counsel McGough and Duff is completely and logically supported by the record of the plea acceptance hearing. The testimony adduced by the Petitioner . . . is contradicted by the record and the three judge panel at the time he entered his plea. The testimony presented on behalf of the Petitioner is therefore found to lack credibility.

(Docket # 26 at A-5, A-6, A-7). The Court of Appeals affirmed Judge Zaleski's rejection of the claim, stating,

> Post's allegation that counsel had promised him that his life would be spared if he entered a plea of no contest was supported by the testimony of some of his witnesses. Although these witnesses testified that counsel had made such promises, this evidence was contradicted by the testimony of Post's trial counsel. The trial court specifically found that Post's evidence lacked credibility. It was within the province of the trial court as trier of fact to believe Post's attorneys instead . . .
>
> Although the attorneys hoped that the plea would be considered in mitigation, they never made any guarantees to Post. Both attorneys denied promising Post that his life would be spared if he entered a plea of no contest, but instead testified that they had informed Post that the death penalty was a distinct possibility.
>
> Post failed to establish that he had been misled by trial counsel . . .

(Docket # 27, Ex. RR at 5-6).

These factual findings are well-supported by the record. At the postconviction evidentiary hearing, Mr. Duff testified that he and Ms. McGough never guaranteed Mr. Post that he would not receive the death penalty if he pled no contest. (Docket # 23, Ex. 4 at 30, 33). Ms. McGough also testified that she did not tell her client that Judge Betleski would refrain from imposing the death penalty on a no contest plea. (Docket #

23, Ex. 4 at 46-47, 56-58, 62). Even two of Mr. Post's witnesses, Patricia Post and Gary Post, testified that Ms. McGough said that Mr. Post could avoid a death sentence with a plea of guilty, not a plea of no contest. (Docket # 23, Ex. 4 at 68, 76-77). Although Mr. Post testified that he was promised that he would not receive the death penalty if he pled no contest, the Ohio Courts did not find this testimony credible. Credibility determinations are not re-visited on habeas review. Matthews v. Abramajtys, 2003 WL 261192 (6th Cir.); Lefever v. Money, 225 F.3d 659, 2000 WL 977305, * 5 (6th Cir.).

Moreover, in his nine-page petition to withdraw his plea of not guilty and enter a plea of no contest, Mr. Post affirmed that no one promised him leniency in exchange for his no contest plea and that he was aware that death was a possible sentence. (Docket # 27, Ex. YY). This understanding was re-affirmed in Mr. Post's extensive dialogue with Judge Betleski during the change of plea hearing. (Docket # 23, Ex. 1 at 29, 34-35, 37-38, 39-40).

Thus, Mr. Post has not rebutted, by clear and convincing evidence, the factual finding of the Ohio courts that defense counsel never promised Mr. Post that he would avoid the death penalty if he pled no contest. The analysis of Judge Zaleski and the Ohio Court of Appeals was not an unreasonable application of Strickland. Therefore, Mr. Post's argument that his counsel were ineffective during the guilt phase because of this alleged guarantee is unavailing.

c. Conclusion Regarding First Ground for Relief

For the reasons discussed above, Mr. Post has not demonstrated that his counsel were constitutionally ineffective in their pretrial investigation or during plea

negotiations and the entrance of his no contest plea. Thus, Mr. Post's First Ground for Relief fails.

2. Second Ground for Relief (Involuntary Plea Due to Ineffective Assistance of Counsel)

In his Second Ground for Relief, Mr. Post contends that his plea of no contest was involuntary because he received ineffective assistance from his counsel. Specifically, Mr. Post claims that his attorneys assured him that he would not receive the death penalty if he pled no contest and that he was confused about how to plead because his attorneys could not agree on an appropriate plea.

This Court addressed Mr. Post's first contention above, under the First Ground for Relief. The Ohio courts found that defense counsel did not promise Mr. Post that he would avoid the death penalty with a no contest plea. In addition, they did not find Mr. Post's limited evidence to the contrary to be credible. These factual findings have ample support in the record. As Mr. Post has not shown, by clear and convincing evidence, that these findings were incorrect, they are presumed correct. Given these factual findings, the conclusion of the Ohio courts that defense counsel did not render ineffective assistance by making a guarantee to Mr. Post is not an unreasonable application of Strickland. Thus, this allegation does not support Mr. Post's claim that his plea was involuntary.[16]

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[16] Mr. Post also contends that the affidavits of Judges Betleski and Cirigliano demonstrate that Ms. McGough's credibility is questionable because the affidavits allegedly show that she never spoke with the judges about Mr. Post's plea, as she claimed. This argument is meritless. In their affidavits, which were sworn to almost 15

Mr. Post's second argument is that his plea was not voluntary because disagreements between his attorneys regarding the appropriate plea left him confused about how to plead. The longstanding test for determining the validity of a plea of guilty or no contest is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985), citing North Carolina v. Alford, 400 U.S. at 31.

The Ohio Courts have examined the voluntariness of Mr. Post's plea. On direct review, the Supreme Court of Ohio stated,

> there is convincing proof in the record that appellant understood the effect of his no contest plea, and that such plea was made knowingly and intelligently.
>
> At the plea hearing, appellant submitted a nine-page petition to withdraw his prior plea of not guilty and enter a plea of no contest. The petition states, inter alia, that appellant had been advised of the charges against him and apprised of the penalties for each offense if convicted. Further, the petition admitted the truth of all the facts alleged in the indictment, and requested the court to accept appellant's no contest plea in accordance with the terms of the petition and the negotiations entered into between his counsel and the state. Before accepting appellant's plea, the court reviewed the petition in detail with appellant, engaging in an extensive colloquy with him to insure [sic] that he was fully aware of his constitutional rights and understood the consequences of his plea. Under these facts, we conclude that appellant's no contest plea was valid and properly accepted by the panel.

State v. Post, 32 Ohio St.3d at 387. Similarly, on postconviction review, Judge Zaleski stated,

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years after the conversations would have occurred, the judges merely state that they do not recall discussing Mr. Post's no contest plea with Ms. McGough. (Docket # 83, Ex. 1 and 2). In light of the passage of a substantial amount of time, these statements do not impugn Ms. McGough's testimony. Moreover, as Mr. Post concedes, this argument does not directly impact on the question of whether any promises were made to Mr. Post by his counsel. (Docket # 84 at 62).

> This court specifically finds that the plea entered by the Petitioner was knowingly, intelligently, and voluntarily made. The court so finds because the Petitioner was fully advised of his rights and the possible penalties at the time he entered his plea before a three judge panel.
>
> The dialogue between the panel accepting the plea and the Petitioner was extensive . . .

(Docket # 26, Ex. NN at A-6).

There is some evidence in the record that Mr. Post was confused about how he should plead. In her affidavit, Patricia Post stated, "Ron was very confused as to the nature of the proceedings, he kept stating he did not know what to do." (Docket # 48, Ex. 5 at Ex. G at ¶ 7). At the evidentiary hearing before Judge Zaleski, she testified, that Mr. Post was confused about what plea to enter "right up until the last minute." (Docket # 23, Ex. 4 at 69). Gary Post's affidavit states, "I talked with my brother Ronald Post the morning he entered his No Contest Plea . . . during that telephone conversation, Ron was crying and stated that he did not know what course of action to pursue. He appeared confused." (Docket # 48, Ex. 5 at Ex. H at ¶ 2). Moreover, Ms. McGough and Patricia Post both testified that the two defense attorneys had different views on the appropriate plea, with Ms. McGough in favor of a guilty plea and Mr. Duff apparently in favor of a no contest plea. (Docket # 23, Ex. 4 at 49-50, 69).

On the other hand, Mr. Post's petition to change his plea and the plea colloquy demonstrate that Mr. Post's plea of no contest was voluntary. As the Supreme Court of Ohio noted, the petition clearly explained the consequences of a no contest plea. Mr. Post admitted that he reviewed the petition with Ms. McGough before the change of plea hearing. (Docket # 23, Ex. 4 at 13). In addition, the Ohio courts found the colloquy between Mr. Post and Judge Betleski to be extensive. This finding is well-supported by

the transcript of the hearing, which demonstrates that the colloquy was comprehensive and reveals no indication of any confusion on the part of Mr. Post as to the options available to him or the possible sentences he could receive.

Furthermore, Ms. McGough testified that defense counsel "gave Mr. Post all his options. We explained the penalties, we explained our view of the pros and cons of both pleas, and, as in all cases, ultimately the client has to choose." (Docket # 23, Ex. 4 at 59, 65).

Mr. Post contends that he disregarded the questions and statements of Judge Betleski during the plea colloquy because his attorneys told him what to say. (Docket # 23, Ex. 4 at 13, 14, 21). This claim is not credible. Ms. McGough testified that she never told Mr. Post to disregard what the judges said. (Docket # 23, Ex. 4 at 62). Moreover, Mr. Post's overall testimony included statements that were clearly false. For example, he testified, "I never gave no confession to anybody." (Docket # 23, Ex. 4 at 16). Yet, the record shows that Mr. Post confessed to several individuals, sometimes on tape or in writing. It was not unreasonable for the Ohio courts to find that Mr. Post's testimony lacked credibility.

In Blackledge v. Allison, the Supreme Court of the United States explained, "the representations of the defendant, his lawyer, and the prosecutor at . . . a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." 431 U.S. 63, 73-74 (1977). Mr. Post has not overcome this barrier and presumption. He has not demonstrated that his attorneys were deficient in their explanations to him of the possible consequences of a plea of no

contest. On the contrary, the findings of the Ohio courts that counsel did explain these consequences are presumed correct. Moreover, the transcript of the extensive plea colloquy reveals no evidence of uncertainty or confusion on Mr. Post's part. The transcript does establish that Mr. Post was informed of the constitutional rights he was waiving and the possible penalties he faced if the plea was accepted. Under these circumstances, this Court cannot find that the Ohio courts unreasonably applied federal law when they determined that defense counsel were not ineffective and that Mr. Post's plea was knowing, intelligent, and voluntary.

3. Third Ground for Relief (No Valid Jury Waiver)

In his Third Ground for Relief, Mr. Post argues that his no contest plea was involuntary because there was no valid written waiver of a jury trial, as required by R.C. 2945.05. This provision provides, in relevant part:

> In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant shall be in writing, signed by the defendant, and filed in said cause and made part of the record thereof . . . Such waiver must be made in open court after the defendant has been arraigned and has had an opportunity to consult with counsel.

R.C. 2945.05. Mr. Post contends that the failure to comply with this statute deprived the three-judge panel of jurisdiction to accept Mr. Post's plea and to sentence him. He argues that there was no knowing, intelligent, and voluntary waiver of his right to trial by jury.

As discussed above, this claim is procedurally defaulted. Even if the claim could be considered on the merits, it would not entitle Mr. Post to relief.

A state-law jurisdictional problem can, in some cases, rise to the level of a federal due process violation. Lott v. Coyle, 261 F.3d 594, 607 (6th Cir. 2001). However, there was no jurisdictional problem in this case because, under Ohio law, a plea of guilty or no contest itself waives a defendant's right to a trial by jury. In Martin v. Maxwell, the Supreme Court of Ohio held,

> The provisions of Section 2945.05, Revised Code, requiring the filing of a written waiver of a trial by jury are not applicable where a plea of guilty is entered by an accused. The failure in such an instance to file a waiver does not deprive an accused of any of his constitutional rights nor does it deprive the court of its jurisdiction.

175 Ohio St. 147, 147 (1963). See also, State v. West, 134 Ohio App.3d 45, 51 (1999) (holding "the entry of a plea of guilty by an accused constitutes a waiver of a jury trial."); State v. Smith, 2001 WL 1671429, * 1 (Ohio App. 8 Dist.) (stating, "the guilty plea itself waives a trial, thereby obviating a written waiver as contemplated by R.C. 2945.05."); State v. Carnail, 2001 WL 1382870, *1 (Ohio App. 8 Dist.) (rejecting an identical jurisdictional argument); Matey v. Sacks, 284 F.2d 335, 338 (6th Cir. 1960) (citing an Ohio case for the proposition that a plea of guilty or no contest waives the right of trial by jury."). As the Ohio Court of Appeals explained in State v. Schofield, the "written waiver requirement is designed to apply to those cases where the accused waives a jury trial and elects a bench trial." 1999 WL 1225564, * 8 (Ohio App. 4 Dist.). Similarly, in State v. Buzzard, the Ohio Court of Appeals noted, "the trial court must obtain from the defendant a written and signed jury waiver if the defendant will proceed to a bench trial. The guilty plea itself waives a trial, whether by judge or jury, thereby obviating a written and signed jury waiver as contemplated by R.C. 2945.05." 2002 WL 1349228, * 2 (Ohio App. 8 Dist.). Thus, when a defendant pleads guilty or no contest, that plea waives the

defendant's right to a jury trial along with other constitutional rights. Under either plea, the defendant is not proceeding with a jury trial and is not opting for a bench trial. As Mr. Post pled no contest to the charges against him, a separate written jury waiver is not required under Ohio law.

Federal constitutional law parallels Ohio law in this regard. A plea of guilty or no contest[17] waives several constitutional rights, including the right to trial by jury. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); United States v. Layne, 192 F.3d 556, 577 (6th Cir. 1999). These rights are validly waived by a plea of no contest if the plea is entered intelligently and voluntarily. Alford, 400 U.S. at 31; Layne, 192 F.3d at 577; United States v. Abbe, 1990 WL 198926, *2 (6th Cir.).

Here, there is ample evidence that Mr. Post's plea of no contest was intelligent and voluntary. Judge Betleski engaged in a lengthy dialogue with Mr. Post at the change of plea hearing. In response to Judge Betleski's questions, Mr. Post confirmed that he could read and write the English language, that he understood each of the charges and elements contained in the indictment, that he understood the rights he was relinquishing by pleading no contest (including the right to trial by jury), that he was satisfied with his attorneys, that his lawyers had fully informed him about all legal matters, and that he had informed them of all factual matters. (Docket # 23, Ex. 1 at 17-29). Judge Betleski discussed the possible penalties for each count, expressly listing death as a possible sentence for each of the two counts of aggravated murder with

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[17] The distinction between a plea of guilty and a plea of no contest "is of no constitutional significance" with respect to standards of validity. North Carolina v. Alford, 400 U.S. 25, 37 (1970). See also, United States v. McGlocklin, 8 F.3d 1037, 1047 (6th Cir. 1993) (recognizing no constitutional distinction between a guilty plea and a no contest plea).

specifications on seven different occasions. (Docket # 23, Ex. 1 at 29, 39-40). Mr. Post also stated that he was not promised leniency or any other benefit in exchange for his plea of no contest. (Docket # 23, Ex. 1 at 34-35).

In addition to this colloquy, Mr. Post signed a nine-page petition to withdraw his plea of not guilty and to enter a plea of no contest. (Docket # 23, Ex. 1 at 15-16; Docket # 27, Ex. YY). The petition affirmed that Mr. Post was aware of the constitutional rights he was waiving and the potential consequences of his plea of no contest.

Furthermore, Mr. Duff and Ms. McGough presented their certificate of counsel to the panel. The certificate, which defense counsel signed in open court in the presence of Mr. Post, certified that defense counsel explained the allegations of the indictment and the maximum penalty for each charge to the defendant, that Mr. Post understood that a no contest plea is an admission to the truth of the allegations contained in the indictment, that the plea was consistent with their advice, that the plea was voluntary, and that defense counsel recommended to the court that it accept the plea of no contest. (Docket # 23, Ex. 1 at 10-11; Docket # 49, Ex. 27).

Thus, the record, taken as a whole, indicates that Mr. Post's no contest plea was voluntarily and intelligently entered. This valid plea waived Mr. Post's right to trial by jury. The U.S. Constitution requires no additional written jury waiver.

4. Fourth Ground for Relief (Revealing Privileged Communications)

In his Fourth Ground for Relief, Mr. Post argues that he was denied the effective assistance of counsel because privileged communications were made known to the prosecution by someone on the defense team. This argument is based on the following facts and factual allegations. Mr. Post met with Mr. Holmok for a polygraph test on 21 May 1984. Mr. Slusher testified that, in August 1984, Mr. Post told him that he signed a written confession during the polygraph examination. Yet, Mr. Post claims that the prosecution knew of the specifics of the interview with Holmok and of Mr. Post's confession before Mr. Slusher could have told the prosecutors in August. He asserts that Lorain County Prosecutor Gregory White telephoned Mr. Holmok in June regarding Mr. Holmok testifying before the Grand Jury about the interview. Mr. Post also alleges that, on 16 July 1984, the prosecution supplemented its witness list to add Mr. Holmok. Mr. Holmok was subpoenaed on 1 August 1984 to testify before the Grand Jury. Mr. Post concludes that the prosecution "somehow . . . obtained the results of the polygraph interview" and that "[t]he only possible source for such information could have been the defense attorneys, polygraph examiner, investigator, and/or other agents of the defense attorneys." (Docket # 16 at 23, 25). In sum, Mr. Post claims, "The sequence of events makes it seem likely that the only way the Lorain County Prosecutor's Office could have known by July of 1984 that the polygraph had been taken was that someone from Mr. Post's defense team revealed privileged information in violation of Mr. Post's constitutional rights." (Docket # 84 at 71).

As a preliminary matter, the Court notes that the record provides no evidence of the alleged telephone call from Mr. White to Mr. Holmok or of a change in the prosecution's witness list to include Mr. Holmok. Even assuming that the prosecutors

knew of the outcome of Mr. Post's interview with Mr. Holmok before Mr. Slusher told them in August 1984, Mr. Post's argument is unavailing.

First, Mr. Post's claim is speculative and logically flawed. Mr. Post merely assumes that some unknown individual on the defense team disclosed information to the prosecution because only Mr. Post, his attorneys, and Mr. Holmok knew of the confession before his conversation with Mr. Slusher in August 1984. There is no direct evidence of any kind to support this assumption. Moreover, there are other plausible explanations for how the prosecution could have received this information. Mr. Post himself may have told someone else of the confession before he told Mr. Slusher. After all, he had an established pattern of confessing his crimes to others. It also is possible that someone overheard the conversation between Mr. Holmok and Mr. Post or a discussion between members of the defense team. It does not logically follow that someone on the defense team revealed this information to the prosecution.

Furthermore, Mr. Post has not established that he was prejudiced by the alleged disclosure. He claims that the prosecution's knowledge of his confession to Holmok led to its admissibility, which in turn "was at least one of the driving forces that compelled Mr. Post to enter his plea." (Docket # 84 at 69-70). On direct review, the Supreme Court of Ohio found "that the statement of facts submitted to the court, subsequent to appellant's no contest plea, did not refer to the confession made to Holmok." State v. Post, 32 Ohio St.3d at 386. On postconviction review, Judge Zaleski found "that the State of Ohio did not refer to or rely on the confession the Petitioner made to his polygrapher in obtaining the conviction." (Docket # 26, Ex. NN at A-10). Judge Zaleski also found that

"Petitioner's confession was available through numerous sources" because Mr. Post confessed to so many individuals. (Docket # 26, Ex. NN at A-10).

These factual findings are entitled to a presumption of correctness. Thus, even if there was deficient performance, Mr. Post suffered no prejudice because (1) the State did not rely on the confession to Mr. Holmok in its Statement of Facts, (2) there were several other confessions for the State to rely upon, and (3) given the substantial evidence against him and the other "driving forces" affecting him, it is likely that Mr. Post would have entered the same plea of no contest if the confession had not been available to the prosecution.

Because Mr. Post has not demonstrated deficient performance by his counsel or prejudice from such a deficiency, his claim of ineffective assistance of counsel lacks merit.

5. Fifth Ground for Relief (Jailhouse Informant)

In his Fifth Ground for Relief, Mr. Post contends that his right to counsel was violated by the State's use of an jailhouse informant to elicit incriminating statements from him. Specifically, he alleges that Mr. Slusher was cooperating with the State for the purpose of obtaining statements from Mr. Post. Mr. Post told Mr. Slusher of his confession to Mr. Holmok and then confessed separately to Mr. Slusher. According to Mr. Post, the State's use of Mr. Slusher led him to plead no contest.

In United States v. Massiah, the U.S. Supreme Court held that the government violated a defendant's Sixth Amendment right to counsel when it deliberately elicited incriminating information from an indicted defendant who was entitled to the assistance

of counsel. 377 U.S. 201, 206 (1964). The Court noted that the right to counsel applied to "indirect and surreptitious interrogations," not just formal police station interrogations. Id. In Maine v. Moulton, 474 U.S. 159 (1985), and Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986), the Supreme Court explained that "the primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." The Kuhlmann Court held,

> Since the Sixth Amendment is not violated whenever – by luck or happenstance – the State obtains incriminating statements from the accused after the right to counsel has attached, a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks.

477 U.S. at 459 (internal citations and quotation marks omitted).

Mr. Post has established that Mr. Slusher was cooperating with the prosecution and that he agreed to elicit statements from Mr. Post. Mr. Slusher testified that he took information regarding Mr. Post to the prosecution. (Docket # 78 at 34). Mr. Slusher's letter of 29 July 1984 began, "No more than 20 minutes I finally got the complete story from Ron Post as to what happened on the night of the murder Dec. 15, 1983." (Docket # 48, Ex. 5 at Ex. CC). The letter then relays a confession from Mr. Post. Furthermore, in an affidavit, Michael Tully, one of Mr. Slusher's attorneys in 1984, claimed that "it was determined by the Lorain County Prosecutor's Office that Richard Slusher would intentionally elicit statements from Ronald Post concerning his Aggravated Murder case" in exchange for sentencing consideration. (Docket # 48, Ex. 2 at Ex. 1). Mr. Tully also stated "[t]hat Slusher's role as an informant and his working relationship with the Lorain County Prosecutor's Office (his efforts to solicit informant [sic] from Post) was never

placed upon the record." (Docket # 48, Ex. 2 at Ex. 1). Mr. Tully asserted that robbery charges against Mr. Slusher were dismissed as a result of Mr. Slusher's cooperation. In addition, the record includes a letter from Gregory White to Judge Betleski, in which Mr. White reminded the judge that Mr. Slusher "was of a help to the State of Ohio in the Case of the State of Ohio -v- Ronald Post" and informed him that the prosecutor's office had no objection to Mr. Slusher receiving shock probation. (Docket # 48, Ex. 2 at Ex. 3). There is also a letter dated 15 January 1985 from Mr. White to Mr. Duff, which explained that Mr. Slusher was sentenced to three to fifteen years in one case, which would run concurrently with his sentence in a prior case, and that the charges in two other cases against Mr. Slusher were dismissed. (Docket # 48, Ex. 2 at Ex. 4). Taken as a whole, the record clearly demonstrates that Mr. Slusher was cooperating with the State and that he had agreed to solicit information from Mr. Post regarding the aggravated murder of Mrs. Vantz.

However, it is unclear whether Mr. Slusher actually "took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." Mr. Slusher testified that Mr. Post initiated the conversation regarding his confession to Mr. Holmok because "he had to talk. He had to get something off his mind, and he wanted my opinion." (Docket # 78 at 32). Although Mr. Slusher's letter states that he "finally got the complete story from Ron Post as to what happened on the night of the murder," this language is ambiguous; it does not indicate that Mr. Slusher did anything other than listen to Mr. Post's confession. Moreover, the letter describes Mr. Post's confession without any reference to questions by Mr. Slusher or other attempts to actively elicit information. After the confession is described, the letter does refer to

Mr. Slusher's question as to why Mr. Post previously lied to him about his involvement in the murder. However, the letter's narrative suggests that this question followed the full confession of Mr. Post and, therefore, did not elicit it. Mr. Tully's reference to Mr. Slusher's "efforts to solicit" information from Mr. Post is vague and non-specific. It does not demonstrate that Mr. Slusher's efforts went beyond being available to Mr. Post and listening to him.

Overall, the record does not establish that Mr. Slusher "took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks" from Mr. Post. Thus, Mr. Post's Massiah claim fails.

Even if Mr. Post had shown that the State had violated his right to counsel, he would be unable to demonstrate prejudice. If the statements to Mr. Slusher were suppressed, then the government would lose Mr. Post's confessions to Mr. Holmok and Mr. Slusher. However, as discussed above, the loss of these confessions would not affect the outcome of the proceedings. The State did not rely on the confessions in its Statement of Facts. (Docket # 13, Ex. 1 at 52-58). Instead, it relied upon several confessions to other individuals. Moreover, in light of the fact that Mr. Post was very unlikely to prevail at trial, that there was a chance that a no contest plea would be considered in mitigation, and that Mr. Post was unwilling to plead guilty, it is very likely that Mr. Post would have entered a no contest plea even if the confessions had been inadmissible.

Mr. Post's Fifth Ground for Relief, then, does not entitle him to federal habeas relief.

6. Sixth Ground for Relief (Failure to Disclose Favorable Evidence)

In his Sixth Ground for Relief, Mr. Post claims that the prosecution unconstitutionally failed to disclose favorable evidence to him, as required by Brady v. Maryland, 373 U.S. 83 (1963). Specifically, he contends that the "State never disclosed the fact that law enforcement officials planted Slusher in Mr. Post's cell block for the precise purpose of providing the prosecution with incriminating information." (Docket # 84 at 1). Mr. Post contends that, with this information, he could have suppressed his confessions to Mr. Holmok and Mr. Slusher.

As discussed above, this claim is procedurally defaulted. Even if it were not barred, this Brady claim would not entitle Mr. Post to relief.

In Brady, the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Thus, "[t]o assert a successful Brady claim, a petitioner must show that (1) evidence favorable to the petitioner (2) was suppressed by the government and (3) therefore the defendant was prejudiced." Esparza v. Mitchell, 310 F.3d 414, 424 (6th Cir. 2002) (citing Strickler v. Greene, 527 U.S. 263 (1999)). The Brady rule encompasses both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). Favorable evidence is material under Brady (and a defendant is prejudiced) "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" of the proceeding. Id. When assessing materiality, the Court looks to the

cumulative effect of all suppressed evidence. Kyles v. Whitley, 514 U.S. 419, 421, 436 (1995). There is no Brady violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998) (internal citation and quotations marks omitted).

Here, Mr. Post has shown that the evidence at issue was favorable to him. Information regarding the relationship between the State and Mr. Slusher, whereby Mr. Slusher cooperated with the State in exchange for sentencing consideration, would be relevant to Mr. Slusher's credibility as a witness.[18] Thus, this is Brady material.

However, Mr. Post has not met his burden of demonstrating that the State suppressed this evidence. At the 20 November 1984 evidentiary hearing, before Mr. Post pled no contest, Mr. Slusher testified that he relayed information about Mr. Post to the prosecution. (Docket # 78 at 34). The defense, therefore, had actual notice that there was some cooperative relationship between the State and Mr. Slusher. More importantly, there is no direct evidence in the record regarding exactly what defense counsel did or did not know about Mr. Slusher's relationship with the Lorain County Prosecutor's Office. Mr. Post merely asserts that the defense was unaware of the

[18] In his petition, Mr. Post also refers to an audio tape of a telephone conversation concerning a plot to assassinate a prospective government witness. He contends that defense counsel was aware of the plot, "but was never informed that this information was obtained by Mr. Slusher, a paid informant." (Docket # 16 at 28). A review of the record shows that this information was not obtained by Mr. Slusher. The tape at issue was of a conversation between Mr. Post and Byron Martin, which was recorded by Lawrence Jezewski, an investigator with the Lorain County Prosecutor's Office. (Docket # 23, Ex. 2 at 71, 76-77). There is no indication that Mr. Slusher was involved with the tape in any way.

specific nature and extent of the relationship. This is insufficient to prove a Brady violation.

In addition, Mr. Post cannot demonstrate prejudice. There is no reasonable probability that the outcome of the proceedings would have been different had the State produced this information. As the Court explained with respect to the previous Ground for Relief, even if Mr. Post had received the information and had used it to suppress his confessions to Mr. Holmok and Mr. Slusher, it is very likely that he would have pled no contest anyway and that this plea would have been accepted.

As Mr. Post has not met two of the three Brady requirements, his Sixth Ground for Relief would have failed on the merits had it not been procedurally defaulted.

7. Seventh Ground for Relief (Ineffective Assistance of Counsel During Mitigation Phase)

In his Seventh Ground for Relief, Mr. Post contends that Ms. McGough and Mr. Duff provided him with ineffective assistance during the mitigation phase of his case. He offers several examples of defense counsel's alleged incompetence. Specifically, he claims that defense counsel were ineffective in their mitigation investigation, requested a pre-sentence investigation report that contained prejudicial and inadmissible information, failed to provide Dr. Haglund with sufficient background information, relied on a court-appointed psychologist who was not trained for mitigation phase work, failed to investigate the possible involvement of others in the aggravated murder, prepared the mitigation witnesses as a group shortly before the mitigation hearing, requested that the victim's son be permitted to speak at the hearing, lacked an understanding of capital sentencing law, and failed to object to certain arguments by the prosecutor.

a. Ohio's Death Penalty Scheme

An understanding of Ohio's death penalty sentencing law and procedures is essential to an analysis of Mr. Post's claim. Under Ohio's death penalty statute, a defendant charged with aggravated murder cannot receive a death sentence unless the indictment contains at least one of the eight aggravating circumstances set forth in O.R.C. 2929.04(A). The aggravated murder and the specification must be proven beyond a reasonable doubt. In this case, the relevant aggravating circumstance is

> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery . . . and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(Docket # 23, Ex. 2 at 13). Once an aggravating circumstance is established, a defendant has the burden of showing, by a preponderance of the evidence, that one or more of the seven mitigating factors listed in O.R.C. 2929.04(B) applies. The mitigating factors at issue in this case are:

> (4) The youth of the offender;
>
> (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; . . .
>
> (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

O.R.C. 2929.04(B). The three-judge panel is to "weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender" and any mitigating factors. O.R.C. 2929.04(B). The defendant is given great latitude in the presentation of evidence of mitigating factors. O.R.C. 2929.04(C). The death penalty must be imposed

if the three-judge panel unanimously finds that the State has proven, beyond a reasonable doubt, that the aggravating circumstances outweigh any mitigating factors. O.R.C. 2929.03(D)(1) and (D)(3).

Thus, where an aggravating circumstance has been established, as in this case, the defendant has the affirmative burden of presenting a mitigation case at the sentencing hearing. If a defendant fails to establish the existence of a mitigating factor, a death sentence is mandatory.

b. State Court Review

On direct review, the Supreme Court of Ohio addressed Mr. Post's claim of ineffective assistance of counsel at the mitigation phase. The court stated,

> Here, defense counsel obtained stipulations as to the age of appellant; that he had no prior felony or juvenile record; and that the death penalty had not been imposed in any prior cases in Lorain County involving the charge of aggravated murder. In addition, defense counsel offered the testimony of appellant's common-law wife, stepmother and mother. The record shows that defense counsel conducted a thorough examination of each witness and elicited positive testimony relating to appellant's family life, his behavior, disposition and potential for rehabilitation. Counsel presented the testimony of Jane Core of the Ohio Public Defender Commission reporting the status of capital sentencing in the state of Ohio. Finally, appellant gave an unsworn statement during which he asked the victim's family for forgiveness, and begged for mercy from the three-judge panel. While these offerings carry little mitigating weight, as balanced against the appellant's aggravated murder conviction, we find that counsel presented the case in mitigation competently, and did the best they could with the facts available to them. We are not impressed by the lengthy list of additional mitigating evidence that appellant says should have been introduced at the mitigation stage. As this court stated in Lytle,
>
> > We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best available practice in the defense field. There are many attorneys who fail to use the best available practices, yet relatively few who are found to be incompetent.

State v. Post, 32 Ohio St.3d at 388-389 (internal citations omitted). Thus, despite the fact that Mr. Post presented to the Supreme Court of Ohio his sub-claims regarding inadequate investigation, the failure to provide background information to the psychologist, and counsel's misunderstanding of capital sentencing law, the Supreme Court focused on counsel's presentation at the mitigation hearing. As the Ohio Supreme Court determined that counsel performance was not deficient, it did not discuss prejudice.

c. Petitioner Post's Sub-Claims

This Court will examine each of Mr. Post's sub-claims in turn. Then, the Court will make an overall determination as to whether counsel's performance was constitutionally deficient and whether prejudice resulted.

i. Failure to Investigate Sub-Claim

Mr. Post's first sub-claim is that his counsel conducted an ineffective mitigation investigation because "they did not talk to most of Mr. Post's family, and relied instead upon the investigation conducted by the Lorain County Adult Probation Department." (Docket # 16 at 29). He asserts that, had a reasonable investigation been conducted, evidence of the following would have been discovered and could have been presented in mitigation:

A. Mr. Post's family was marked by inadequate parenting modes and lack of appropriate discipline.

B. Mr. Post's family resources and attention were directed toward a younger brother who had suffered medical problems at birth causing Mr. Post to experience anger and feelings of displacement.

C. Mr. Post's parents divorced when he was only eight years old. The divorce involved a "spouse-swapping" with another couple.

D. When Mr. Post's mother remarried, the stepfather was not allowed to discipline him.

E. Mr. Post was bothered by his large size and being overweight, which led to a poor self-image and feelings of alienation.

F. Mr. Post began using diet pills, prescribed by a doctor, to lose weight. Mr. Post began to abuse these prescriptions and began to use and abuse non-prescription drugs.

G. Mr. Post was having problems with his common-law wife.

H. Mr. Post's step-child was afflicted with Sudden Infant Death Syndrome.

I. Mr. Post's common-law wife became pregnant, causing additional stress due to unemployment and additional feelings of displacement.

(Docket # 16 at 30-31).

Mr. Post has established that his counsel did not conduct a mitigation phase investigation of his background. In her affidavit, Verona Post states that no member of the defense team ever contacted her for background information on her stepson. (Docket # 48, Ex. 5 at Ex. F). Similarly, Gary Post, Helen Post, neighbors, friends, two aunts, an uncle, and a cousin all submitted affidavits in which they stated that defense counsel did not contact them for background information on Mr. Post prior to the mitigation hearing. (Docket # 48, Ex. 5 at Ex. L1, L2, M, P-X). According to Gary Post and Helen Post, Mr. Duff failed to take written notes when Mrs. Post supplied him with the names and addresses of potential character witnesses. (Docket # 48, Ex. 5 at Ex.

L1, M). Furthermore, Dr. Nancy Schmidtgoessling, a clinical psychologist with experience in the mitigation phase of capital cases, noted that defense counsel did not collect any records or collateral information in preparation for the mitigation hearing and opined that defense counsel did not adequately research Mr. Post's background. (Docket # 48, Ex. 5 at Ex. J). Even the family witnesses who testified at the mitigation hearing stated that they were prepared by defense counsel as a group for a total of ten minutes just prior to the hearing. (Docket # 48, Ex. 5 at Ex. F, M, Y). According to Helen Post, Mr. Duff merely asked, "What would you say?" (Docket # 48, Ex. 5 at Ex. M). In short, there is no evidence in the record to indicate that defense counsel conducted even a minimal mitigation investigation.

In Strickland, the Supreme Court specifically addressed the duty of counsel to conduct pretrial and mitigation investigations:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 690. The Sixth Circuit has reiterated this clearly established law. See Mapes v. Coyle, 171 F.3d 408, 426 (6th Cir. 1999) (stating, "when a client faces the prospect of bring put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation."); Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992) (stating, "Where counsel fails to investigate and interview promising witnesses, and therefore, has no reason to believe they would not be valuable

. . . counsel's inaction constitutes negligence, not trial strategy.") (internal quotation marks omitted).

With respect to this sub-claim, this Court finds the Ohio Supreme Court's analysis of defense counsel's performance an unreasonable application of Strickland because it plainly disregards Strickland's holding that, in order to render effective assistance, defense attorneys must fulfill their duty to conduct a reasonable mitigation investigation. The Supreme Court of Ohio dismisses Mr. Post's contention that his counsel performed no meaningful investigation by stating, "We are not impressed by the lengthy list of additional mitigating evidence that appellant says should have been introduced at the mitigation stage." State v. Post, 32 Ohio St.3d at 389. This statement misses the point. Defense counsel did not make a strategic decision not to present certain evidence in mitigation or an informed decision not to investigate certain facts. Instead, Mr. Duff and Ms. McGough failed to do any independent investigation into Mr. Post's background in preparation for the mitigation hearing. The complete failure to conduct an independent mitigation investigation constitutes constitutionally-deficient performance under Strickland.

However, Mr. Post has not demonstrated prejudice as a result of defense counsel's failure to conduct a mitigation investigation for several reasons. First, much of the information Mr. Post claims should have been presented in mitigation in fact was presented at the mitigation hearing through witness testimony, the PSR, and Dr. Haglund's psychological evaluation. Sharon Harsh Post testified that she and her husband had marital problems, that their children were "crib death babies," that Mr. Post used marijuana, and that, at the time of the murder, Mr. Post was unemployed and she

was in the midst of a high-risk pregnancy. (Docket #23, Ex. 2 at 32-43). The PSR stated that Mr. Post used non-prescription drugs, such as amphetamines, barbituates, LSD, cocaine, and THC. (Docket # 24, Ex. I at A96). Dr. Haglund reported that, before the murder, Mr. Post had high stress due to the health problems of the children and the neighborhood in which the Posts lived. (Docket # 24, Ex. I at A67). Dr. Haglund noted that Mr. Post's mother disapproved of him and seemed to favor his brother. (Docket # 24, Ex. I at A67). The evaluation also stated that Mr. Post was "involved with drugs and the drug scene since high school." (Docket # 24, Ex. I at A67). According to Dr. Haglund, Mr. Post used drugs in part "to lose weight and to calm him down from the effects of weight-reducing drugs." (Docket # 24, Ex. I at A67). Thus, a reasonable mitigation investigation would have produced little evidence that was not already presented to the three-judge panel.

Second, to the extent that mitigation information was not presented to the panel, there is no reasonable probability that the information would have changed the outcome of the proceeding. Evidence that Mr. Post was poorly disciplined as a child, had parents who divorced, and had a poor self-image because he was overweight would be very unlikely to constitute a mitigating factor sufficient to outweigh the aggravating circumstance of committing aggravated murder during the course of an aggravated robbery and being the principal offender in the murder.

This potentially-mitigating evidence is not nearly as significant as that of cases in which the Supreme Court or the Sixth Circuit has found prejudice. The evidence does not rise to the level of that in Williams v. Taylor, 529 U.S. at 395-396, where evidence of the defendant's nightmarish childhood of physical abuse, of his borderline mental

retardation, and of his prison commendations was not introduced, or of that in Coleman v. Mitchell, 268 F.3d 417, 450-451 (6th Cir. 2001), where counsel failed to present evidence that the defendant was borderline retarded and likely had an organic brain dysfunction and was raised by his grandmother who ran her home as a brothel and gambling house and who physically and psychologically abused him by involving him in voodoo practices of killing animals and exposed him to group sex, bestiality and pedophilia.

The un-presented mitigation evidence in this case does not even match that of cases in which the Sixth Circuit did not find prejudice. In Abdur-rahman v. Bell, the Sixth Circuit determined that the defendant was not prejudiced by counsel's incompetence at the mitigation hearing even though counsel failed to put on evidence (1) of shocking childhood abuse involving the defendant's father striking his penis with a baseball bat and forcing him to eat cigarettes and his own vomit and (2) of the defendant's conversations with people who did not exist, banging of his head against the wall, and belief that his wife would give birth to the next Messiah. 226 F.3d 696, 721-723 (6th Cir. 2000) (dissent). Similarly, in Williams v. Coyle, the Sixth Circuit found no prejudice even though evidence was not presented that the defendant was molested at age five, used cocaine at age thirteen, was frequently beaten with extension cords and other objects, and had a low IQ. 260 F.3d 684, 721 (6th Cir. 2001) (dissent). Clearly if the failure to present the dramatic, potentially-mitigating evidence described in these cases does not constitute prejudice, defense counsel's failure to present comparatively-weak mitigation evidence in this case does not rise to the level of Strickland prejudice.

Third, Mr. Post was not prejudiced insofar as some of the mitigating evidence he wanted presented could actually have weakened his mitigation case. For instance, evidence of Mr. Post's drug abuse may not have reflected well on him. As Judge Boggs noted in his dissent in Mason v. Mitchell, "To some, recounting a childhood filled with drug use and crime would arouse sympathy and an explanation for otherwise heinously violent crimes, but to others it would tell a story of waste, lifelong moral turpitude, and incorrigibility." 2003 WL 252101 (6th Cir.) (dissent).

Finally, there is no prejudice because the mitigation hearing presentation was helpful to Mr. Post. Mr. Duff and Ms. McGough presented useful stipulations, a well-argued and well-developed proportionality argument, and the positive testimony of three family members. They also managed to limit the State's rebuttal of the mitigation evidence and convinced the panel to not consider an audio tape in which Mr. Post allegedly plotted the murder of a witness.

In sum, defense counsel's failure to conduct any independent mitigation investigation constitutes deficient performance under Strickland. With respect to this sub-claim, the Supreme Court of Ohio's application of Strickland was unreasonable. Nevertheless, Mr. Post has not demonstrated that he suffered prejudice as a result of this deficient performance because most of the mitigating evidence undiscovered by counsel was presented anyway, the remaining evidence was weak and, in some cases, cut both ways, and the overall mitigation presentation was adequate.

ii. Other Sub-Claims

Mr. Post also argues that defense counsel were ineffective because they requested a PSR, which contained prejudicial and inadmissible information and which, under Ohio law, if requested, automatically is presented to the three-judge panel. It is true that defense counsel requested a PSR and that a PSR would not have been produced without such a request. O.R.C. 2929.03(D)(1). It is also true that the report contained details of Mr. Post's criminal history and a damaging victim impact statement from Mr. Vantz. However, when counsel's actions are viewed without the benefit of hindsight and with due deference, this Court cannot conclude that their request for a PSR constituted deficient performance. Defense counsel were following a statutory procedure, knew that Mr. Post's criminal history was limited, and had no reason to believe that the probation officer would include a prejudicial victim impact statement. At the time, it was reasonable for counsel to think that a PSR would provide useful information to the panel as to the minimal nature of Mr. Post's prior criminal record and the stress and family problems affecting him at the time of the murder. Thus, the request is not an example of deficient performance.

Next, Mr. Post contends that his counsel failed to provide Dr. Haglund with sufficient background information for his psychological evaluation. The record does show that defense counsel failed to provide any background information to the psychologist because they failed to locate such information through an independent mitigation investigation. This failure was unreasonable and constitutes deficient performance. However, Mr. Post was not prejudiced by this deficiency. Even without the background information, Dr. Haglund was able to produce an evaluation that discussed Mr. Post's character, history, and background. In fact, much of the mitigating evidence

not presented by defense counsel at the mitigation hearing was presented by Dr. Haglund in his report. As discussed above, Dr. Haglund discussed Mr. Post's family problems, his mother's favoritism of his brother, and Mr. Post's drug use and efforts to reduce his weight. (Docket # 24, Ex. I at A67). Moreover, there is no indication in the record of any psychological problem that Dr. Haglund was unable to assess due to a lack of background information provided by defense counsel. Dr. Haglund's clinical impression, based on multiple interviews, was that Mr. Post was not a psychiatrically-disturbed individual. (Docket # 24, Ex. I at A67). Thus, this particular deficiency in counsel's performance did not prejudice Mr. Post.

Mr. Post further contends that defense counsel relied on a court-appointed psychologist who was not trained in mitigation phase work. There is no evidence in the record that Dr. Haglund lacked training or experience in mitigation evaluations. Even if he did lack such experience, defense counsel's use of his evaluation, without more, would not constitute deficient performance under Strickland. Moreover, Mr. Post would be unable to demonstrate prejudice because Dr. Haglund produced a useful evaluation.

Next, Mr. Post claims that counsel was ineffective because they failed to investigate the possible involvement of other individuals in the murder to support a mitigating factor of residual doubt. As a preliminary matter, Mr. Post fails to specify who or what should have been investigated but was not. Assuming that such an investigation was not undertaken, Mr. Post does not point to any evidence that such an investigation would have revealed which would have supported a mitigation argument of residual doubt. Besides, Ms. McGough did not make a residual doubt argument at the mitigation hearing. Instead, she was making a fairness/proportionality argument: that it is unfair for

one person involved in a crime to receive the death penalty while others who may have been involved are not even indicted. In light of the substantial evidence of Mr. Post's guilt and the fact that defense counsel was not presenting a residual doubt argument, Mr. Post has not demonstrated prejudice.

Mr. Post also claims that Mr. Duff prepared his mitigation witnesses as a group just before the start of the hearing. The record substantiates this claim. Verona Post, Helen Post, and Patricia Post each stated in affidavits that Mr. Duff prepared the family member mitigation witnesses as a group for a total of ten minutes just prior to the mitigation hearing. (Docket # 48, Ex. 5 at Ex. F, M, Y). According to Verona Post, "Mr. Duff told us what to testify to. Mr. Duff wanted us to make Ron look good, which would have caused us to give inaccurate testimony." (Docket # 48, Ex. 5 at Ex. F). Helen Post stated that Mr. Duff merely asked her, "What would you say?" (Docket # 48, Ex. 5 at Ex. M). Patricia Post claimed that Mr. Duff told the witnesses "at the same time to testify as to the exact same details." (Docket # 48, Ex. 5 at Ex. Y). This type of minimal, last-minute preparation of witnesses clearly is unreasonable. Mr. Duff's instructions to the witnesses failed to adequately prepare them for testifying and evince a disregard for the truth. Put simply, Mr. Duff's preparation of the mitigation witnesses was constitutionally deficient.

Nevertheless, Mr. Post has not demonstrated that he suffered prejudice as a result of this incompetence. Each of the four witnesses provided testimony that was mostly positive. Sharon Post testified that Mr. Post was fantastic with his children and was kind, compassionate, loving, and caring. (Docket # 23, Ex. 2 at 32). She also explained some of the pressures felt by her husband at the time of the murder. (Docket

23, Ex. 2 at 32-34). Ruth Post and Helen Post also testified that Mr. Post never exhibited anti-social behavior or a propensity for violence and that he could be rehabilitated. (Docket # 23, Ex. 2 at 48-4956, 58). Jane Core provided useful statistics with respect to the sentences received by defendants who pled guilty or no contest to capital murder. (Docket # 23, Ex. 2 at 64-67). Thus, even without adequate preparation, the defense witnesses performed well and provided positive testimony. Although their testimony probably would have been more believable, convincing, and honest had Mr. Duff done a better job preparing the witnesses, it is unlikely that these witnesses would have had anything else positive to say about Mr. Post or would have provided background information that had any prospect of adequately explaining his behavior. Therefore, Mr. Post was not prejudiced by Mr. Duff's deficient performance in witness preparation.

Mr. Post's next claim is that Ms. McGough was incompetent because, at the mitigation hearing, she requested that Mrs. Vantz's son be permitted to speak, and this request led to a prejudicial statement by William Vantz. Mr. Post is correct that Ms. McGough stated, "We now request that the victim's family be permitted to speak." (Docket # 23, Ex. 2 at 88). Mr. Vantz then gave a victim impact statement in which he said that Mr. Post's crime was inexcusable, that he could never forgive Mr. Post, and that Mr. Post should be executed. (Docket # 23, Ex. 2 at 90-91). This statement was very similar to the statement Mr. Vantz made in the PSR, which was available to Ms. McGough before the hearing. (Docket # 24, Ex. I at A90). Therefore, she should have known that his statement during the hearing would negatively reflect on Mr. Post.

Moreover, at the time of Mr. Post's sentencing, Ohio law did not require the presentation of a victim impact statement at a capital mitigation hearing. Although, in ordinary felony cases, victim impact statements were required to be prepared by probation and considered by the judge, O.R.C. §§ 2929.12, 2947.051, this requirement did not apply in capital cases. The Ohio Death Penalty Statute specifically stated, "When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division." O.R.C. § 2929.03(D)(1). That division provided an exhaustive list of materials that could be considered by a jury and judge in capital sentencing, a list which did not include victim impact statements. Id. Thus, an attorney familiar with Ohio's death penalty procedures should have known that a victim impact statement was not required.

As Ms. McGough should have known that Mr. Vantz's statement would be damaging to her client and that Ohio law did not require Mr. Vantz to be given an opportunity to make his statement at sentencing, Ms. McGough's request to have the victim's son speak at the mitigation hearing is an example of deficient performance.

Nevertheless, Mr. Post was not prejudiced by this deficient performance. First, the substance of Mr. Vantz's statement already was available to the judges through the PSR; the statement in the PSR and the oral statement are nearly identical. More importantly, the transcript of the hearing demonstrates that the prosecutor and the judges were under the impression that they were required to allow Mr. Vantz to speak and that they intended to have him speak even before Ms. McGough's request. For example, Mr. Nagy began the hearing by referring to the victim's family and stating, "the procedure, I believe, is that at some point the Court would address them and ask if they

had any statement to make, not so much in the nature of evidence in the case but rather as feelings of the family." (Docket # 23 at 4). Judge Betleski did not contradict this impression. Then, when Ms. McGough asked that the family be permitted to speak, Judge Betleski granted the request and said, "We'd be happy to hear what you have." (Docket # 23 at 88-89). After Mr. Vantz's statement, Judge Betleski thanked him and said, "We appreciate your presentation." (Docket # 23 at 91). Thus, a careful review of the transcript shows that all hearing participants believed that a victim impact statement was permissible, or even required. Had Ms. McGough not requested the statement, it appears that the prosecutor or the judges would have done so. Mr. Nagy's initial statement on the issue seems to be such a request. In the context of this hearing, however deficient counsel's performance in requesting that the victim's family be permitted to speak, Mr. Post was not prejudiced.

Mr. Post also claims that his counsel did not understand Ohio capital sentencing law. Specifically, he asserts that his counsel incorrectly believed that Mr. Post had the burden of proving by a preponderance of the evidence that the mitigating factors outweighed the aggravating circumstances, that the victim's family could state their preference for a death sentence, and that new aggravating circumstances could be introduced at the mitigation hearing that were not charged in the indictment or proven beyond a reasonable doubt. Mr. Post's factual assertion is partially correct. Ms. McGough twice stated her belief that Mr. Post had the burden of showing by a preponderance of the evidence that the mitigators outweighed the aggravating circumstance. (Docket # 23 at 28-29, 105). These statements reflect a misunderstanding of Ohio law, which, in fact, requires the State to prove beyond a

reasonable doubt that the aggravating circumstances outweigh the mitigating factors. As discussed above, it is also apparent that Ms. McGough believed that Mr. Vantz was entitled to make a victim impact statement. However, there is no reason to believe that defense counsel thought that new aggravating circumstances could be introduced at the mitigation hearing. In fact, Mr. Duff successfully sought to limit Mr. Nagy's presentation to the principal offender element of the relevant aggravating circumstance. (Docket # 23 at 16-24). In addition, although it is clear that defense counsel did not demonstrate a comprehensive understanding of Ohio capital sentencing law, they frequently cited specific provisions of the death penalty statute during the hearing and based legal arguments on the statute. (Docket # 23 at 16-24, 80). Overall, the Court cannot say that counsel's performance was constitutionally deficient in this respect.

Even if defense counsel's performance were deficient, Mr. Post makes no argument as to how he was prejudiced by any misunderstandings of the law his counsel may have had. It is doubtful that a correct understanding of the State's burden would have altered defense counsel's presentation. As Ms. McGough's lack of understanding of the law surrounding victim impact statements in capital sentencing hearings appears to have been shared by the prosecutor and judges, it is unlikely that a correct conception of the law would have prevailed. Had Ms. McGough not requested an opportunity for Mr. Vantz to speak, the prosecution likely would have. Moreover, even if Mr. Vantz had not presented his duplicative statement in open court, his statement already was read by the judges in the PSR. Thus, Mr. Post has not demonstrated prejudice on this sub-claim.

Finally, Mr. Post claims that his attorneys erroneously failed to object to Mr. Nagy's statements that a death sentence would be reviewed by appellate courts, that the facts themselves were an aggravating circumstance, that Mr. Post was guilty of other offenses for which he had not been charged, and that the family of the victim was entitled to justice. As a preliminary matter, Mr. Nagy did make each of these statements. However, defense counsel's decision not to object to these statements does not constitute ineffective assistance of counsel. The appellate review statement was a correct statement of the law. Also, the statement was made to judges familiar with the law, not jurors.

The aggravating circumstance statement -- that the facts themselves were an aggravating circumstance -- was ambiguous and isolated. Throughout the mitigation hearing, Mr. Nagy consistently specified that the single aggravating circumstance at issue was the commission of aggravated murder during the course of an aggravated robbery where the defendant was the principle offender in the aggravated murder. (Docket # 23 at 15, 94-95, 96, 107). It was not unreasonable for defense counsel to elect not to object to an isolated reference to the facts of the case as being aggravating factors.

Mr. Nagy's reference to Mr. Post's participation in a plot to kill a witness was made during an argument to the judges about whether the prosecution could offer an audio tape of the conspiracy conversation to rebut the positive mitigation testimony elicited by defense counsel. Defense counsel did object to the use of the tape or the consideration of this type of rebuttal evidence, and Judge Betleski sustained the objection. There was no attorney error.

The last statement by Mr. Nagy was that "the Vantz family is entitled to justice." (Docket # 23 at 108). Mr. Post does not explain why this statement warranted an objection. It was not an outrageous or extreme statement. It was the only statement of its kind made by Mr. Nagy during the mitigation hearing. Defense counsel's decision not to object was not unreasonable.

Therefore, Mr. Post's final sub-claim is unavailing. Defense counsel did not provide ineffective assistance by failing to object to the statements cited by Mr. Post.

d. Overall Assessment of Performance and Prejudice

Having examined each of Mr. Post's sub-claims, an overall assessment of defense counsel's performance during the mitigation phase is appropriate. In light of defense counsel's failure to conduct any mitigation investigation, to adequately prepare defense witnesses, and to supply Dr. Haglund with any background information, as well as Ms. McGough's request that Mr. Vantz be permitted to speak at the mitigation hearing, it is clear that counsel's overall performance was constitutionally deficient. These deficiencies flow from counsel's failure to fulfill their duty to investigate the case and from a misunderstanding of the law, not from strategic decisions. The Supreme Court of Ohio's exclusive focus on the actual mitigation hearing presentation essentially ignores these aspects of Mr. Post's claim and the dictates of Strickland. The Ohio Supreme Court's ruling that defense counsel's performance was not deficient is, therefore, an objectively unreasonable application of Strickland. When defense attorneys completely fail to conduct a mitigation investigation, their performance is

constitutionally deficient under Strickland, regardless of whether or not they do an adequate job with respect to other aspects of the mitigation phase.

Despite counsel's deficient performance, Mr. Post has not demonstrated prejudice. The mitigating information that could have been collected through a reasonable investigation mostly was presented at the hearing through other sources. The remaining evidence cited by Petitioner was not compelling and was not reasonably probable to affect the outcome of the proceeding. Mr. Post's mitigation witnesses provided positive testimony and were not likely to provide more helpful testimony with further preparation.[19] Even without background information from counsel, Dr. Haglund was able to prepare an adequate psychological evaluation. Regardless of whether Ms. McGough had requested that Mr. Vantz be permitted to speak, it is apparent fom the record that he would have been permitted to do so. The substance of his victim impact statement would have been conveyed to the panel through the PSR even if he had not been allowed to make an oral statement at the hearing. Overall, then, there is no reasonable probability that, without counsel's errors, Mr. Post would have received anything other than the death penalty. As he suffered no prejudice, Mr. Post's ineffective assistance of counsel claim fails.

8. Eighth Ground for Relief (Ineffective Assistance of Counsel Regarding Expert)

[19] Verona Post's statement that "Mr. Duff wanted us to make Ron look good, which would have caused us to give inaccurate testimony" strongly suggests that additional positive testimony was unlikely to be elicited. (Docket # 48, Ex. 5 at Ex. F).

In his Eighth Ground for Relief, Mr. Post argues that his counsel were ineffective because they failed to prepare an adequate social history for Dr. Haglund to use in the preparation of his psychological evaluation of Mr. Post. According to Mr. Post, "The inevitable result was that . . . the three judge panel [was] denied the benefit of a complete psychological profile of Mr. Post." (Docket # 84 at 86).

In his traverse, Mr. Post makes it clear that this is a pure ineffective assistance of counsel claim: "the gravamen of this ground for relief is trial counsel's failure of the duty to provide Mr. Post with the kind of effective assistance of counsel that the United States Constitution requires a capitally charged defendant must receive." (Docket # 84 at 91). Thus, this is not an ineffective expert assistance claim. Strickland, therefore, is the clearly established federal law applicable to this claim.

Mr. Post's claim is duplicative of one of his sub-claims of his Seventh Ground for Relief. As the Court explained above, the record establishes that defense counsel failed to provide any background information to Dr. Haglund because they failed to locate such information through an independent mitigation investigation. The Court concluded that this failure was unreasonable and constituted deficient performance. However, Mr. Post was not prejudiced by this deficiency. Dr. Haglund elicited information about Mr. Post's background from Mr. Post during several interviews. Even without defense counsel's assistance, Dr. Haglund was able to produce an evaluation that discussed Mr. Post's character, history, and background. The report discussed several potential mitigating factors, such as Mr. Post's family problems, his mother's favoritism of his brother, Mr. Post's drug use, and his efforts to reduce his weight. (Docket # 24, Ex. I at A67). Moreover, as the Court explained above, there is nothing in the record to suggest any

psychological problem that Dr. Haglund was unable to evaluate due to defense counsel's inadequate performance. On the contrary, Dr. Haglund's clinical impression, based on multiple interviews, was that Mr. Post was not a psychiatrically-disturbed individual. (Docket # 24, Ex. I at A67). As Mr. Post did not suffer any prejudice, his ineffective assistance of counsel claim does not entitle him to relief.

9. Ninth Ground for Relief (Victim Impact Statements)

In his Ninth Ground for Relief, Mr. Post claims that his rights to a reliable sentencing determination and to be free from cruel and unusual punishment were violated by the improper introduction of victim impact statements at his mitigation hearing.

One victim impact statement was presented in the initial PSR, in which the probation officer summarized a conversation she had with Helen Vantz's son, William, and his wife, Sheri. (Docket # 24, Ex. I at A90-A91). The PSR relayed,

> Mr. Vantz stated that initially his emotions had been mixed regarding the death penalty for the defendant, but over time he became convinced that the defendant should receive the death penalty. They indicated that Helen Vantz was never given an opportunity for her life, and that they know that she would have just given the defendant the money during the robbery. The defendant did not, they emphasized, need to have shot and killed Helen Vantz. The Vantz's [sic] also indicated that Helen Vantz was executed for $100.00; and emphasized the biblical "eye for an eye." They stated that Helen Vantz had no appeal rights for her life. Both Mr. and Mrs. Vantz indicated that they did not want the defendant on the street, ever again.

(Docket # 24, Ex. I at A-90). Mr. and Mrs. Vantz further explained that Helen Vantz lost the opportunity to spend Christmas with their family, which she had been unable to do for the past 13 years because of her work schedule. (Docket # 24, Ex. I at A90). The

PSR also relayed that Michael Vantz lost his only surviving and actively-involved grandparent and that the Vantz family felt that "[t]he scars of her loss will always be a reminder prior to the holidays and carried through the holidays, casting its dark cloud." (Docket # 24, Ex. I at A91).

The second victim impact statement was presented orally by William Vantz at the mitigation hearing. He explained that the murder scared his family and that his mother was "a caring, loving woman who would do anything for anyone" and who "would never, ever hurt anyone." (Docket # 23, Ex. 2 at 89-90). He further stated,

> She enjoyed her life to the fullest, and for it to be taken in such a way is just inexcusable. I cannot in my heart forgive Mr. Post; I never will. There is no way I could do that. He took from me my mother, and my mother was – Mr. Post had a chance to defend himself; she never got that chance. She was executed, and I feel the only just punishment for execution is execution. My family feels that way, my cousins, my brothers, our wives, friends of the family. . . I'm going to leave it in your hands to do what's right, what's just. I'm not versed in the law, but yet in my heart I feel the only thing to do is to give Mr. Post what he deserves.

(Docket # 23, Ex. 2 at 90-91).

Mr. Post contends that the introduction of these statements was unconstitutional under the U.S. Supreme Court's decision in Booth v. Maryland, 482 U.S. 496 (1987). In Booth, the Supreme Court held that the Constitution prohibits a jury from considering a victim impact statement during the sentencing phase of a capital murder trial. The Court distinguished between two types of information: (1) a description of the personal characteristics of the victim and the emotional impact of the crime on the victim's family and (2) the family's opinions and characterizations of the crime and the defendant. Id. at 502. The Supreme Court found that the information about the victim and family were "wholly unrelated to the blameworthiness of a particular defendant" and "could divert the jury's attention away from the defendant's background and record, and the

circumstances of the crime." Id. at 504-505. With respect to the family's opinions and characterizations of the crime and the defendant, the Court was concerned that the presentation of this type of information could "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. at 508. Thus, the Supreme Court decided that the admission of victim impact statements "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id. at 503.

The same types of victim impact information involved in Booth were presented in this case. Mr. Vantz described the personal characteristics of his mother: "a caring, loving woman who would do anything for anyone," who "would never, ever hurt anyone," and who "enjoyed her life to the fullest." The Vantzes described the emotional impact of Helen Vantz's murder on their family by stating that the murder scared the family and deprived Michael Vantz of his only surviving and actively-involved grandparent, and that the family felt that "[t]he scars of her loss will always be a reminder prior to the holidays and carried through the holidays, casting its dark cloud." The statements also included several characterizations of the crime and of Mr. Post, as well as the family's opinion that Mr. Post should be executed.

On direct review, the Supreme Court of Ohio rejected Mr. Post's claim on the merits. State v. Post, 32 Ohio St.3d at 382-384. The court determined that the admission of the victim impact statements violated Ohio statutory law, but that Mr. Post suffered no prejudice because there is a presumption that judges will consider only relevant, material, and competent evidence when sentencing and there was no

"indication that the panel was influenced by or considered the victim impact evidence in arriving at its sentencing decision." Id. After analyzing the Booth decision, the Supreme Court of Ohio found that there was no federal constitutional violation because Booth did not apply to this case: "The risks of arbitrary and prejudicial sentencing which guided the court in Booth are not present in the case sub judice because this case was before a three-judge panel rather than a jury." Id. at 384.

On federal habeas review, this Court cannot examine the Supreme Court of Ohio's conclusions that Ohio law was violated and that the violation did not prejudice Mr. Post. Only federal constitutional claims are cognizable in federal habeas proceedings. Mr. Post has not alleged that any state law violation rose to the level of a due process violation. In fact, in his petition and traverse, he does not mention the Ohio statutory provisions discussed by the Supreme Court of Ohio.

This Court's focus is on Mr. Post's constitutional claim under Booth. Under AEDPA, Mr. Post is entitled to habeas corpus relief only if the Ohio Supreme Court's analysis "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). A state court decision is "contrary to" federal law only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [the

Supreme] Court's decisions but unreasonably applies that principle to the facts of the particular state prisoner's case." Id. at 413.

As a preliminary matter, the briefing discusses two U.S. Supreme Court decisions handed down subsequent to Booth involving the constitutionality of victim impact statements in capital sentencing hearings: South Carolina v. Gathers, 490 U.S. 805 (1989), and Payne v. Tennessee, 501 U.S. 808 (1991). These cases were decided in 1989 and 1991, after the Supreme Court of Ohio's 1987 decision in Post. Because these precedents were not clearly established law at the time of the Supreme Court of Ohio's decision, this Court cannot consider them when assessing whether the Ohio Supreme Court's determination was contrary to, or involved an unreasonable application of, clearly established federal law. The established U.S. Supreme Court precedent at issue here is Booth.

The first question, then, is whether the appropriate standard for this situation is "contrary to" or "unreasonable application of." The Sixth Circuit recently addressed this issue in Brewer v. Anderson, 47 Fed.Appx. 284 (6th Cir. 2002). In Brewer, the petitioner was sentenced to death by a panel of three Ohio judges after the admission of victim impact evidence from the victim's husband in the PSR. On direct review, the Supreme Court of Ohio, citing its decision in Post, held that Booth does not apply to situations in which a defendant is tried and sentenced by a three-judge panel rather than a jury. Id. at 287-288. The Sixth Circuit explained, "Because the Ohio Supreme Court correctly identified Booth as the relevant United States Supreme Court precedent governing this issue, the question is whether its interpretation represents an unreasonable application

of Booth." Id. at 288. The Sixth Circuit determined that the Ohio Supreme Court's distinction was reasonable and, therefore, that it did not unreasonably apply Booth. Id.

Here, the Ohio Supreme Court discussed the Booth case and identified it as the relevant U.S. Supreme Court precedent. As in Brewer, the Ohio Supreme Court found that Booth did not apply because a three-judge panel, not a jury, sentenced Mr. Post. This interpretation of Booth is not unreasonable. Booth involved a capital sentencing by a jury. The U.S. Supreme Court identified the question presented in Booth as "whether the Constitution prohibits a jury from considering a 'victim impact statement' during the sentencing phase of a capital murder trial." 482 U.S. at 497. The U.S. Supreme Court's rationale for finding the admission of such evidence unconstitutional focused mostly on concerns that victim impact evidence would inflame or divert jurors. Id. at 505, 508-509. Although the Booth opinion does include some broad language and the concerns of the Court would apply to some extent to judges, the Supreme Court of Ohio did not act in an objectively unreasonable way when it interpreted Booth as applying only to capital sentencing by juries.

The Ohio Supreme Court's determination that the admission of victim impact statements in this case did not violate the federal Constitution because Booth does not apply to sentencing by a three-judge panel was not contrary to or an unreasonable application of clearly established U.S. Supreme Court precedent. Therefore, Mr. Post is not entitled to relief under AEDPA for this claim.

10. Tenth Ground for Relief (Failure to Find Mitigating Factors)

Mr. Post describes his Tenth Ground for Relief as a claim that he was deprived of his right to a reliable sentencing determination because the three-judge panel failed to find that any mitigating factors existed. A review of Mr. Post's petition and traverse, however, shows that he actually is raising five distinct, but related, claims in this Ground for Relief. He claims: (1) the panel failed to consider any of the mitigating evidence because it assigned them no weight; (2) the panel erred by finding that no mitigating factors existed; (3) contrary to Ohio statute, the panel failed to state the reasons why the aggravating circumstance outweighed the mitigating factors presented; (4) contrary to Ohio statute, the panel failed to make specific findings as to the existence of any mitigating factors and aggravating circumstances; and (5) the panel considered and weighed non-statutory aggravating circumstances.

The federal Constitutional law governing these claims is straightforward. In Estelle v. McGuire, the U.S. Supreme Court explained, "We have stated several times that federal habeas corpus relief does not lie for errors of state law . . . it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." 502 U.S. 62, 67-68 (1991) (internal quotation marks and citations omitted). In Eddings v. Oklahoma, the Supreme Court held that, although a capital sentencer must consider any relevant mitigating evidence, the sentencer and state appellate courts "may determine the weight to be given relevant mitigating evidence." 455 U.S. 104, 114 (1982). The Court emphasized that federal habeas courts do not themselves weigh mitigating evidence against aggravating circumstances. Id. at 117.

Here, the three-judge panel issued its written sentencing opinion on 14 March 1985. (Docket # 49, Ex. 14). The panel noted the defense's presentation of

witness testimony, Mr. Post's unsworn statement, the arguments of counsel, the stipulations, the PSR, and the psychological evaluation. The panel expressly stated that it

> concluded that in this offense the State proved beyond a reasonable doubt only one factor of aggravating circumstances pursuant to 2929.04(A)(7) O.R.C., that:
>
> 1. Ronald Post was the principal offender, and that the offense of murder was committed while the offender was committing aggravating robbery while possessed of a firearm.

(Docket # 49, Ex. 14 at 3). The panel then explained,

> In their deliberations, pursuant to O.R.C. 2929.04(B) the panel considered and weighed against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender, and particularly the factors stressed by defense counsel, viz:
>
> O.R.C. 2929.04(B)(4) The youth of the offender.
>
> The panel considered the age of the defendant and found that he was not a youthful offender.
>
> O.R.C. 2929.04(B)(5) The offender's lack of significant history of prior criminal convictions and delinquency adjudications.
>
> The panel found no delinquency adjudications. The panel found the misdemeanor convictions reflected a tendency to violence.
>
> O.R.C. 2929.04(B)(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.
>
> The panel considered under this factor of mitigation:
>
> 1. The "no contest" plea. The panel found this failed as an admission by the offender.
>
> 2. The argument that this sentence should be proportionate to sentences of other capital crimes in Lorain County and the State of Ohio. The panel found such inapplicable as a mitigating factor under the case law of Pulley v. Harris, 79 L. Ed. 2d 29; State v. Jenkins, 15 O.S. 3d 164, at page 208.

3. Statement of the offender. The panel considered this factor in mitigation of possible sentence.

4. The unindicted supplier of the weapon. The panel considered this statement of counsel in argument, but found no evidence to support the statement.

Based upon all of the foregoing, the panel found unanimously that the state has proved the aggravating circumstances beyond a reasonable doubt, and the defendant did not prove the mitigating factors by a preponderance of the evidence, and the sentence of death should be imposed.

(Docket # 49, Ex. 14 at 3-4).

On direct appeal, the Ohio Court of Appeals noted that the trial court found just one aggravating circumstance and no mitigating factors. (Docket # 24, Ex. F at A14). The Court of Appeals specifically held "that when a defendant has been found guilty of at least one of the aggravating circumstance of R.C. 2929.04(A), and no mitigating factors are found, the reason the aggravating circumstances outweigh the non-existent mitigating factors is obvious." (Docket # 24, Ex. F at A15). The Court stated, "Where no mitigating factors are found, any aggravating circumstance necessary weighs more." (Docket # 24, Ex. F at A15). The Court of Appeals further held,

> This statute does <u>not</u> require that the trial court make specific findings as to the existence or non-existence of the statutory or other mitigating factors. It requires only that the trial court make specific findings as to the mitigating factors that it finds do exist.

(Docket # 24, Ex. F at A16). The Court then examined each potential mitigating factor and determined that the trial court was correct in finding that no mitigating factor was established by a preponderance of the evidence. (Docket # 24, Ex. F at A19-A21). The Court of Appeals then re-weighed the non-existent mitigating factors against the aggravating circumstance, concluding that the one proven aggravating circumstance

outweighed any mitigating factors beyond a reasonable doubt. (Docket # 24, Ex. F at A22-A26).

The Supreme Court of Ohio similarly rejected Mr. Post's claims. The Court stated, "Review of the panel's opinion shows that it considered each factor submitted in mitigation of the offense." Post, 32 Ohio St.3d at 389. The Supreme Court of Ohio found, "Although R.C. 2929.04(B) requires a trial court or three-judge panel to consider the factors ennumerated therein . . . it does not require the court or panel to find that such evidence establishes a mitigating factor or factors." Id. (internal quotation marks omitted). The Court held, "the panel did not err in attributing no weight to the evidence presented in mitigation of the offense." Id. at 390. The Court also found, "Implicit in the panel's finding that no mitigating factors were proven is the deduction that there were no mitigating factors to be outweighed by the aggravating circumstance." Id. at 391. The Supreme Court of Ohio then independently reviewed the evidence and concluded that no mitigating factors were present and, therefore, that the aggravating circumstance outweighed any mitigating factors beyond a reasonable doubt. Id. at 393-395.

This Court now will examine each of Mr. Post's claims in turn.

Mr. Post's first contention is that the panel unconstitutionally failed to consider any of the mitigating evidence because it assigned it no weight. This claim incorrectly equates giving no weight to a factor with not considering that factor. As the Supreme Court of Ohio explained, a panel properly can consider a potentially-mitigating factor, determine that it is not proven by a preponderance of the evidence, and, accordingly, assign that factor no weight when the panel balances aggravating circumstances with mitigating factors. This is exactly what the panel did in this case. The panel accepted a

variety of mitigation evidence, which it summarized in its sentencing opinion. The panel then addressed each potential mitigating factor emphasized by the defense. The panel specifically stated that it considered the following evidence: Mr. Post's age, limited criminal history, no contest plea, and unsworn statement, as well as defense counsel's argument regarding an unindicted participant in the crime. The panel's statement that it found the proportionality argument "inapplicable as a mitigating factor under the case law" is somewhat ambiguous. Based on the fact that the panel accepted Ms. Core's testimony relating to this argument and the fact that the panel stated that the argument was one it considered, it appears that the panel was not stating that it was barred from considering this factor but that, having considered it, the panel determined that the proportionality statistics did not qualify as a mitigating factor. There is no evidence in the record to rebut the Ohio Supreme Court's factual finding that the panel considered each potential mitigating factor. Thus, Mr. Post is incorrect when he asserts that the panel failed to consider all the potential mitigating factors.

Mr. Post's next argument is that the panel erred by finding that no mitigating factors existed. In Eddings, the U.S. Supreme Court held that, although a capital sentencer must consider any relevant mitigating evidence, the sentencer and state appellate courts determine the weight to be given this evidence. 455 U.S. at 114. Here, the three-judge panel, the Ninth District Court of Appeals, and the Supreme Court of Ohio each examined the potential mitigating factors and determined that none had been established by a preponderance of the evidence. They, therefore, assigned no weight to these factors. Each state court provided an ample explanation for its determinations. It is not for this Court to second-guess these determinations on habeas review.

Mr. Post also argues that, contrary to Ohio statute, the panel failed to state the reasons why the aggravating circumstance outweighed the mitigating factors presented. The Ohio Court of Appeals and Supreme Court of Ohio each rejected this contention. In so doing, the Ohio courts interpreted the relevant state statute, O.R.C. 2929.03(F). They held that, when no mitigating factors are proven, the statute does not require the trial court to specifically find that the non-existent mitigating factors are outweighed by the aggravating circumstances. If there are no mitigating factors, logic dictates that even a single aggravating circumstance will outweigh whatever was offered in mitigation. Thus, the Ohio courts, interpreting Ohio law, have rejected Mr. Post's interpretation of the statute. As the U.S. Supreme Court explained in Estelle v. McGuire, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." 502 U.S. at 67-68.

Next, Mr. Post contends that, contrary to Ohio statute, the panel failed to make specific findings as to the existence of any mitigating factors and aggravating circumstances. This claim fails for two reasons. First, the panel did make specific findings as to the existence of mitigating factors and aggravating circumstances. The panel found that one aggravating circumstance and no mitigating factors were proven and explained why this was so. Second, the Ohio Court of Appeals held that the statute requires only that the trial court make specific findings as to the mitigating factors that it finds do exist. Here, the panel found that no mitigating factors existed. Thus, under Ohio law, the panel was not required to make specific findings with respect to the potential mitigating factors.

Finally, Mr. Post claims that the panel considered and weighed non-statutory aggravating circumstances. In support of this claim, Mr. Post notes that (1) during the mitigating hearing, the prosecutor once mentioned the specific facts of the crime as if they were an additional aggravating circumstance, and (2) in its written sentencing opinion, the panel sometimes referred to "aggravating circumstances" in the plural. This argument is unavailing. The panel expressly stated that it found just one statutory aggravating circumstance: that "Ronald Post was the principal offender, and that the offense of murder was committed while the offender was committing aggravating robbery while possessed of a firearm." (Docket # 49, Ex. 14 at 3). The panel even "concluded that the element of prior calculation and design was inapplicable and, therefore, not considered for any purpose." (Docket # 49, Ex. 14 at 3). There is no indication from the sentencing opinion that the panel considered any non-statutory aggravating circumstance. While it is true that the panel uses the plural term "aggravating circumstances" in its opinion, the panel uses this term in the following way: "the panel concluded that . . . the State proved beyond a reasonable doubt only one factor of aggravating circumstances." (Docket # 49, Ex. 14 at 3). Clearly, one cannot infer that the panel considered non-statutory aggravating circumstances from this use of language.

Each of Mr. Post's claims under this Ground for Relief is meritless. Thus, the Tenth Ground for Relief does not entitle Mr. Post to federal habeas corpus relief.

11. Eleventh Ground for Relief (Failure to Hear Evidence)

In his Eleventh Ground for Relief, Mr. Post claims that his federal constitutional right to a reliable sentencing determination was violated because the trial court failed to follow the procedure established by Ohio Criminal Rule 11(C), which requires the court to hear evidence to determine the existence of an aggravating factor.

Ohio Criminal Rule 11(C) states, in relevant part,

> (3) With respect to aggravated murder . . . If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea . . . to the charge, or if pleas . . . to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense [and] . . . (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.
>
> (4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

Furthermore, Ohio Revised Code Section 2945.06 provides, in relevant part, "If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly."

The Supreme Court of Ohio considered Mr. Post's claim on direct appeal. The Court stated, "We conclude that Crim.R. 11(C)(3)(c), when read in part materia with R.C. 2945.06, requires the three-judge panel, upon acceptance of a no contest plea to the charge of aggravated murder, to hear evidence in deciding whether the accused is guilty of aggravated murder beyond a reasonable doubt." Post, 32 Ohio St.3d at 392-393. However, the Supreme Court of Ohio found that "[a] fair reading of the transcript indicates that the parties agreed that the statement of facts proffered by the state would constitute the sole evidence of aggravating circumstances before the court." Id. at 393.

The Court held that, as a matter of Ohio law, "[a]greements, waivers, and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable." Id. The Ohio Supreme Court concluded, "Although R.C. 2945.06 requires the court to 'examine the witnesses' in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence." Id.

Although Mr. Post's petition and traverse cite federal constitutional provisions, his entire argument revolves around Ohio law. He cites no federal cases holding that a state procedural violation during a capital change of plea or sentencing hearing amounts to a federal constitutional violation. Nor does he identify any United States Supreme Court case with a holding contrary to that of the Supreme Court of Ohio in State v. Post. He points to no federal case that stands for the proposition that the U.S. Constitution mandates the taking of evidence process adopted by Ohio, a process which does not apply in non-capital felony cases. Nor has this Court found such a case. However, as the Sixth Circuit explained in Serra v. Michigan Dept. of Corrections,

> While it is true that habeas relief cannot be granted simply on the basis of a perceived error of state law, when an error rises to the level of depriving the defendant of fundamental fairness in the trial process, the claim is remediable on a petition for habeas corpus relief.

4 F.3d 1348, 1354 (6th Cir. 1993) (internal quotation marks and citations omitted). There is no such deprivation of fundamental fairness here.

Mr. Post has established that all participants in the change of plea hearing were under the mis-impression that, as in other felony cases, a statement of facts would suffice as the basis for a plea of no contest to aggravated murder. Toward the

beginning of the hearing, Prosecutor Robert Nagy prefaced the statement of facts by saying, "the State would present, as required by law, a statement of facts or explanation of circumstances that is required to be presented in some detail . . . prior to the acceptance of a plea of no contest." (Docket # 23, Ex. 1 at 5-6). The judges and defense counsel did not object to this statement. In his most recent affidavit, Mr. Duff states, "I believed when the prosecutor stated that he would read a statement of the facts, 'as required by law,' that he had researched the issue [and] was correct that a statement of facts would satisfy the requirements of the law." (Docket # 83 at Ex. 3 at ¶ 6). Moreover, during the plea colloquy, Judge Betleski asked Mr. Post if he understood that the panel was required to take an explanation of circumstances from the prosecutor and that the indictment and explanation of circumstances contained sufficient facts to support a conviction. (Docket # 23, Ex. 1 at 22-23). Judge Betleski also stated, "In this case there will be no witnesses; there will just be a narration of the facts." (Docket # 23, Ex. 1 at 26). The following exchange also took place:

> MR. DUFF: I want to make it clear, Your Honor, that our no contest plea, as I understand the law, is that admission of the facts contained in the indictment, and I don't want that to be misconstrued in any way that we agree or concur in their statement of facts; that they're not a stipulated statement of facts, they're the prosecutor's statement of facts.
>
> JUDGE HARRIS: You don't have to agree or concur, but you were afforded the opportunity to present whatever you wanted to present in contradiction thereto; and you haven't presented anything, so the only thing this Court has is the statement of [the prosecutor].
>
> MR. DUFF: All right. As long as that's understood.

(Docket # 23, Ex. 1 at 59-60).

Mr. Post points to this shared lack of understanding of Ohio's capital murder plea procedure and to the affidavit of Mr. Duff to support his argument that the Supreme

Court of Ohio erred in finding that the defense agreed to the procedure of reading a statement of facts. In the affidavit, Mr. Duff claims that, at the time of the no contest plea, he (and as far as he is aware, Ms. McGough) did not waive Mr. Post's right to a trial de novo to determine the existence of an aggravating factor. (Docket # 83 at Ex. 3 at ¶ 5). He further claims, "neither Ms. McGough nor I entered into an agreement with the prosecutors that a statement of the facts could be used in lieu of the requirement that the three judge panel examine witnesses and hear any other evidence properly presented by the prosecutor in order to make a determination as to the guilt of the defendant." (Docket # 83 at Ex. 3 at ¶ 7). Finally, Mr. Duff states,

> as defense counsel, I objected to and I did not stipulate to the statement of the facts as presented by the prosecution or to the procedure utilized by the prosecution. I did not participate in the drafting of the statement of the facts as read by the prosecutor and I did not agree to the prosecutor's procedure.

(Docket # 83 at Ex. 3 at ¶ 8).

Yet, defense counsel did agree to the procedure followed by the panel. The certificate of counsel explicitly stated that Mr. Post "understands that . . . his attorneys will not contest nor deny the truth of the allegations contained in the prosecuting attorney's explanation of circumstances or statement of facts to the Court of three judges upon tendering said plea." (Docket # 23, Ex. 1 at 12; Docket # 49, Ex. 27). Contrary to Mr. Duff's statements, the record does not show that he and Ms. McGough objected to the procedure of reading of a statement of facts without the taking of testimony during the hearing; he merely notified the panel that the substance of the statement of facts was not itself stipulated to by the defense. (Docket # 23, Ex. 1 at 59-

60). Defense counsel agreed to this procedure in Mr. Post's presence. The Supreme Court of Ohio's factual finding to this effect is well-supported by the record.

It is not fundamentally unfair for the Ohio courts to hold the defense to its agreement or for the Supreme Court of Ohio to affirm a procedure to which the defendant and his counsel consented. Where there is agreement, consent, and no objection to a procedure used in the vast majority of a state's felony cases, there is no fundamental unfairness and, consequently, no federal due process violation. A violation of a state procedure, without more, does not entitle Mr. Post to federal habeas relief.

12. Twelfth Ground for Relief (Unconstitutional Death Penalty Statute)

In his Twelfth Ground for Relief, Mr. Post contends that Ohio's death penalty statute is unconstitutional on its face and as applied to him. He presents a potpourri of arguments as to why the scheme is unconstitutional:

- the virtually uncontrolled discretion of prosecutors in indictment decisions allows for arbitrary and discriminatory imposition of the death penalty;
- the statute fails to require proof of the conscious desire to kill or premeditation and deliberation for the imposition of the death penalty;
- the statute does not utilize the "proof beyond all doubt" standard;
- the statute requires a presentence investigation report, if one is requested by the defendant, to be submitted to the sentencer;
- the State is not required to prove an absence of mitigating factors or that death is the only appropriate sentence;
- the statute provides no method to ensure that the sentencer properly weighs aggravating circumstances against mitigating factors;

- as a general matter, the death penalty is not justified by a compelling governmental interest and is not the least restrictive means to realize such an interest;
- the sentencer is not permitted to consider mitigation evidence not proven by a preponderance of the evidence by the defendant;
- the sentencer is precluded from being swayed by sympathy or mercy;
- the statute requires proof of the aggravating circumstances during the guilt phase;
- with respect to felony murder, the statute does not effectively narrow the class of death-eligible individuals because one of the aggravating circumstances is identical to the core element of the underlying crime;
- the Ohio courts do not collect enough comparison data from death-eligible cases to provide for effective appellate review or an adequate proportionality assessment;
- the Ohio courts engage only in a cursory review of the appropriateness of the imposition of the death penalty in particular cases;
- if no mitigating factors are proven and at least one aggravating circumstance is proven, the death sentence is mandatory;
- in Ohio, the death penalty is imposed in a racially-discriminatory manner;
- the scheme violates international law and, thus, the Supremacy Clause;
- capital sentencing juries are not required to make specific findings regarding the existence of mitigating factors or the ultimate sentence recommendation; and
- electrocution and lethal injection are cruel and unusual means of execution.

(Docket # 16 at 39-50; Docket # 84 at 114-174).

On direct review, the Supreme Court of Ohio upheld the constitutionality of Ohio's death penalty scheme and rejected Mr. Post's claims. Post, 32 Ohio St.3d at 393.

The Sixth Circuit Court of Appeals and the federal district courts within Ohio consistently have upheld the constitutionality of Ohio's death penalty statute.[20] In comprehensive, thorough, and well-reasoned opinions, which are supported by ample United States Supreme Court precedent, these courts have addressed and rejected all but one of Mr. Post's claims, that lethal injection is a cruel and unusual means of execution. Mr. Post does not point to a single American court that has held that death by lethal injection is unconstitutional, and this Court has found no such decision. In fact, federal courts of appeals explicitly have rejected this claim. See, Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997); Woolls v. McCotter, 798 F.2d 695, 698 (5th Cir. 1986). Put simply, Mr. Post's claims are without merit. He is not entitled to federal habeas relief for his Twelfth Ground for Relief.

13. Thirteenth Ground for Relief (Proportionality Review)

In his final Ground for Relief, Mr. Post asserts that he was not afforded a meaningful proportionality review by Ohio's appellate courts, as required by the Eighth Amendment. Specifically, Mr. Post argues that the appellate courts inappropriately limit their pool of comparison cases to those in which the death penalty is imposed by a court

[20] See, Scott v. Mitchell, 209 F.3d 854, 884-885 (6th Cir. 2000); Greer v. Mitchell, 264 F.3d 663, 690-691 (6th Cir. 2001); Buell v. Mitchell, 274 F.3d 337, 367-376 (6th Cir. 2001); Wickline v. Mitchell, 319 F.3d 813, 824 (6th Cir. 2003); Beuke v. Collins, C-1-92-507, 309-326 (S.D. Ohio 1995); Allen v. Mitchell, 1:99CV1067, 95-99 (N.D. Ohio 2002); Williams v. Bagley, 5:00CV2103, 38-44 (N.D.Ohio 2002).

within the same geographic jurisdiction. He argues that "reviewing courts must consider the facts, circumstances and penalty imposed in all cases in which death was a possible penalty regardless of the stage in which the death penalty was not sought or imposed . . . . Basing a proportionality decision on a data bank containing only death verdicts can result in only one conclusion, that all death verdicts are proportional." (Docket # 16 at 51, 53). This claim was one of Mr. Post's many sub-claims for the Twelfth Ground for Relief.

Here, the Ohio courts did conduct a proportionality review. Both the Ohio Court of Appeals and the Supreme Court of Ohio performed such a review and concluded that Mr. Post's sentence was appropriate and neither excessive nor disproportionate. (Docket # 24, Ex. I at A26; Post, 32 Ohio St.3d at 395). Mr. Post's claim is that these reviews were essentially meaningless because of the courts' analytical approach.

Contrary to Mr. Post's assertion, he does not have a federal constitutional right to have appellate courts conduct a review of his death sentence to ensure that it is proportional to that of similarly-situated defendants. In Pulley v. Harris, the United States Supreme Court held that the Eighth Amendment does not require state appellate courts to conduct a comparative proportionality review in capital cases. 465 U.S. 37, 50-51 (1984). Recently, the Sixth Circuit explained, "Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison" when state statute provides for such review, as Ohio's death penalty statute does. Buell, 274 F.3d at 369; Wickline, 319 F.3d at 824. Examining the approach of Ohio's courts, the Sixth Circuit held, "By limiting proportionality review to other cases already decided by a reviewing court in which the death penalty has been

imposed, Ohio has properly acted within the wide latitude it is allowed." Buell, 274 F.3d at 369; Wickline, 319 F.3d at 824.

As Mr. Post has not established a federal constitutional violation, Thirteenth Ground for Relief does not entitle him to federal habeas relief.

J. Certificate of Appealability

Under AEDPA, an appeal from a denial of a writ of habeas corpus may not be taken unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253. A certificate of appealability may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A certificate of appealability must "indicate which specific issue or issues satisfy the showing required." 28 U.S.C. § 2253(c). If a claim was analyzed and rejected by the district court on the merits, the district court must determine whether reasonable jurists could find the district court's decision on that claim "debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where a claim is procedurally defaulted, a certificate of appealability should issue only after a showing that (1) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 478.

Applying these standards, this Court finds that a certificate of appealability should issue on the following Grounds for Relief: First (ineffective assistance of counsel during the guilt phase), Second (involuntary plea due to ineffective assistance of counsel), Fifth (the State's use of an informant), Seventh (ineffective assistance of counsel during the

mitigation phase), Ninth (admission of victim impact statements), Tenth (the trial court's failure to consider mitigating evidence), and Eleventh (the trial court's failure to hear evidence to determine the existence of an aggravating factor). The remaining Grounds for Relief and issues raised in the petition are not debatable or close to presenting a federal constitutional violation.

III. CONCLUSION

For the reasons articulated above, this Court finds that Petitioner Post is not entitled to a writ of habeas corpus because each of his claims is either procedurally defaulted or without merit. His petition for a writ of habeas corpus, therefore, is denied. However, this Court hereby issues a certificate of appealability for the First, Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Grounds for Relief.

IT IS SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE